Supreme Court, U.S.
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No. __-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W. E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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141 pp

QUESTIONS PRESENTED FOR REVIEW

1. On defendants' motion for summary judgment, whether plaintiff's claims under the Age Discrimination in Employment Act ("ADEA") were improperly dismissed on the basis of a purported offer of reinstatement.

2. Whether pre-termination damages and other remedies available under the ADEA were improperly precluded in light of the jury's finding of age discrimination.

3. Whether plaintiff's discrimination claim under ERISA (29 U.S.C. § 1140) was improperly dismissed.

4. Whether the district judge, who reduced the jury's verdict on findings of age discrimination from $750,000 to $75,000, on a remittitur motion, should have been disqualified.

LIST OF PARTIES
TO PROCEEDINGS BELOW

RICHARD HALL LIGHTFOOT,

Petitioner,

v.

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

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No. 99-_____

In the Supreme Court
of the
United States

October Term, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

v.

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Richard Hall Lightfoot, plaintiff-appellant in the proceedings below, respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals dated March 1, 1999.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Second Circuit, Lightfoot v. Union Carbide Corp., is in the Appendix at 1a-6a.

The decision is not published: it states that "this summary order will not be published in the Federal Reporter and may not be cited as precedential authority to this or any other court. . . ."

The decision in a prior appeal is published as Lightfoot v. Union Carbide Corp., 110 F.3d 898 (2d Cir. 1997), and is in the Appendix at 11a-43a. The prior decision holds that the district court violated Mr. Lightfoot's jury trial rights in its remittitur decision because it failed to afford him the option of a new trial, and remanded the matter "to the district court for reconsideration of the court's grant of the remittitur of damages." (43a; 110 F.3d at 915).

The pertinent district court decisions dated October 24, 1995, and May 12, 1994, are in the Appendix at 54a-62a and 63a-94a, respectively.[1]

JURISDICTION

The judgment of the Court Appeals was entered on March 1, 1999. (App. 1a-6a) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

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[1] Citations followed by the suffix "a" refer to the Appendix annexed hereto. Citations preceded by the prefix "J.A." refer to the Joint Appendix filed in the United States Court of Appeals for the Second Circuit.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution, Right to Trial by Jury, is involved in this case. The statutory provisions include the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq. ("ADEA") and particularly 29 U.S.C. §626, the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 216, 255, the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-5(g), and the Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 144 and 455(a). The foregoing provisions are in the Appendix at 108a to 112a.

STATEMENT OF THE CASE

Petitioner is Richard Hall Lightfoot, who was hired as a chemical engineer and had been a career employee of Union Carbide Corporation. His date of birth is June 22, 1935. The pretext given for his termination in early 1992 was a downsizing program.

At age 56, however, Mr. Lightfoot was the both the oldest and most experienced person in the group of employees considered, and also the only one who was terminated. (J.A. 250-251) Previously he told his supervisor that his career objective was to remain with Union Carbide until age 70, evoking a reaction of hostility and disbelief. (J.A. 40-1) Retaliatory demotions ensued that culminated in his termination about two years later. (J.A. 40-51; 267-320)

The termination of Mr. Lightfoot occurred at the same time that he was designated by Union Carbide as the co-inventor of a patented new product of great value, a new anti-icing fluid adding substantially to the safety of airline operations, as well as to Union Carbide's profits. (J.A. 61-62; 284; 301-2; 1744-1748)

Mr. Lightfoot was not only the oldest member of the group considered for termination, but he also was the only one who had ever participated in inventing or developing new products, which he did extensively. (J.A. 61-62; 282-286; 299-301; 1748-1753)

Mr. Lightfoot petitions for review of the use of summary judgment to dismiss his claim under the ADEA, and the denial of any remedy thereunder, notwithstanding the rendition of the following verdict after the first trial (App. 46a-48a):

> "THE CLERK: Would the foreperson please rise.
>
> Has the jury agreed upon a verdict?
>
> "THE FOREPERSON: Yes, we have.
>
> "THE CLERK: To question 1, was age discrimination a motivating factor in the defendants' decision to terminate the plaintiff?
>
> "THE FOREPERSON: Answer yes.
>
> "THE CLERK: To question 2, would the defendants have made the same decision to terminate plaintiff even if it had not taken the plaintiff's age into account?
>
> "THE FOREPERSON: Answer no.
>
> "THE CLERK: To question 3, specify the amount of compensatory damages to be awarded to the plaintiff.
>
> "THE FOREPERSON: Amount $750,000."

Thereafter, the district court remitted the damages awarded by the jury's verdict from $750,000 to $75,000. (App. 51a-59a)

On appeal, the United States Court of Appeals for the Second Circuit held that the district court had erred in granting defendants' motion for remittitur without offering Mr. Lightfoot the option of a new trial on damages as violating the trial-by-jury protections of the Seventh Amendment, citing Kennon v. Gilmer, 131 U.S. 22, 29 (1889). (App. 42a.)

The case was remanded to the district court "for reconsideration of the remittitur of damages." (App. 43a) The district judge did not reconsider the remittitur of damages, however, but instead sent the case to another trial on the issue of damages, after declining to recuse himself. (App. 49a-53a)

At the second trial, following the district court's exclusion of large quantities of evidence proffered on behalf of Mr. Lightfoot (App. 63a-66a), and directing that no reference be made to the jury about the amount of his damages, although that had been permitted in the first trial (App. 36a-37a), a verdict in the amount of $20,000 was returned. (App. 7a-8a.)

The reduced judgment was affirmed in the second appeal in an unpublishable decision. (App. 1a-6a.)

The damages were limited only to compensatory damages under the New York State Human Rights Law. Because Mr. Lightfoot's claims under the ADEA had been dismissed on defendants' motion for summary judgment, Mr. Lightfoot was not permitted to claim liquidated damages for back pay, front pay, or other remedies including attorney's fees available as provided in the ADEA. (App. 55a-58a.)

The net result of the litigation to Mr. Lightfoot has been punitive when the expense of litigation is considered.

Even though the jury found that Lightfoot's termination had been caused by age discrimination, the second jury was forced to speculate about the complex concept of compensatory damages without being permitted to receive any guidance in the form of testimony or comments by counsel. (App. 64a-66a.)

The disparity in the damages awarded in the two trials was not surprising in view of the disparity in the ground rules in the two trials applied by the same judge.

The case cries out for appellate supervision because it involves the abuse of the summary judgment and remittitur procedures by the district judge.

REASONS FOR GRANTING THE PETITION

I. THE PRECLUSION OF ANY REMEDIES UNDER THE ADEA, NOTWITHSTANDING FINDINGS OF AGE DISCRIMINATION, PRESENTS AN IMPORTANT QUESTION FOR REVIEW

The summary judgment dismissal of Mr. Lightfoot's ADEA claims was predicated upon the receipt of a letter purporting to offer reinstatement, and upon this Court's decision in a Title VII case, Ford Motor Co. v. EEOC, 458 U.S. 219, 102 S.Ct. 3057 (1982). (App. 25a-28a; 53a-55a: 69a-70a; 78a-80a.)

Mr. Lightfoot's argument that the purported offer of reinstatement gave rise to disputed fact issues that should have been presented to the jury was rejected. (App. 25a-28a.)

The dismissal of Mr. Lightfoot's ADEA claims was based upon the Second Circuit's conclusion that the "relief specifically

requested by the plaintiff is unavailable as a matter of law" in light of the Court's decision in Ford Motor Co. v. EEOC, 458 U.S. 219, 241. (App. 25a-28a.)

However, the Title VII provisions which were the basis of the decision in Ford Motor,[2] 458 U.S. at 225, are notably absent from the ADEA.[3] The ADEA's remedial provisions refer to the Fair Labor Standards Act of 1938, unlike Title VII, whose remedial provisions are based upon from the National Labor Relations Act, as noted in the opinion in Ford Motor. 458 U.S. 218, 226, footnote 8.

While Title VII provides back pay as a matter of equitable discretion, the ADEA provides it as a matter of right. Lorillard v. Pons, 434 U.S. 575 (1978).

The courts below therefore should not have applied as a matter of law a ruling expressly limited to Title VII to the remedies available under a different statute whose remedial provisions are substantially different from those under Title VII. As stated in Fiedler v. Indianhead Truck Line, 670 F.2d 806, 810 n.3 (8th Cir. 1982),

> "[T]itle VII and the ADEA are not consistent because Congress made the ADEA enforcement provisions a hybrid of the Fair Labor Standards Act and title VII. The clear language of the statutes will often not permit interpreting the statutes in harmony," citing

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[2] ". . . Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against *shall* operate to reduce the back pay otherwise allowable" (emphasis added).

[3] As quoted on page 108a-110a of the appendix annexed hereto.

Lorillard v. Pons, 434 U.S. at 583-84.

Such a fundamental error cannot be allowed to continue to deprive plaintiff herein of his rights and remedies specific to the form of discrimination visited upon him and graft onto a statute whose language does not permit such action a provision that applies only to a different law.

This is a particularly noxious result in light of the unquestioned finding by the jury that age discrimination against Mr. Lightfoot was "a motivating factor in defendants' decision to terminate the plaintiff." (J.A. 2293a)

The importance of review is highlighted by the dismissal of Mr. Lightfoot's ADEA claims on summary judgment notwithstanding the existence of disputed fact issues that had been raised. These included (a) whether the offer involved in the purported reinstatement letter (set forth at App. 102a-103a) in fact was a humiliatingly downgraded job with the same title but not the same function as Mr. Lightfoot's former position, (b) whether he should be forced, as a matter of law, to return as a subordinate of a person whose ageist bias had already resulted in his termination in order to retain his ADEA remedies, or (c) whether that would instead add to the precariousness of Mr. Lightfoot's employment situation and also subject him to adverse health consequences in view of his acute hypertension.

By again exposing Mr. Lightfoot to the risk that a hostile supervisor would search to create yet another pretext to rid himself of Mr. Lightfoot, and purport to justify to his management the earlier action taken requiring Mr. Lightfoot alone to walk the plank under the "forced ranking" procedure used, the purported reinstatement offer would expose Mr. Lightfoot to far greater injury instead of having the effect of mitigating his damages. (App. 25a-28a; 65a-66a; 78a-80a.) See Rodgers v. Western-Southern Life Ins. Co, 12 F.3d 668, 677 (7th

Cir. 1993).

Such disputed fact issues involving offers of reinstatement have commonly been required to be submitted to a jury, not decided as a matter of law in other courts. See Bruno v. W.B. Saunders Co., 882 F.2d 760, 771 (3d Cir. 1989) ("We also observe that the evidence surrounding the [purported reinstatement offer] could support a conclusion that position was offered her in bad faith.").

The decision to grant summary judgment dismissing the ADEA claims, notwithstanding the disputed fact issues raised below, therefore should be reviewed to determine whether such decisions are inconsistent with the decisions in other circuits and the principle established by this Court in Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986), that "[the] evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."

The price of obtaining a remedy under the ADEA cannot have been intended to include forcing a victim of age discrimination once more to subject himself to a hostile supervisor guilty of age discrimination against him under the applicable statutory provisions.

So far as we can determine, this presents an issue of first impression and the importance of its consideration by this Court is self-evident.

II. REVIEW IS URGENTLY NEEDED TO PRESERVE THE EFFICACY OF THE REMEDIAL PROVISIONS OF THE ADEA

In McKennon v. Nashville Banner Publishing Co., 513 U.S. 352 (1995), certiorari was granted to review the effect of a summary judgment dismissal of remedies under the ADEA based upon post-termination circumstances extrinsic to the plaintiff's age discrimination claim.

An a fortiorari situation for certiorari is presented by the instant petition. Summary judgment was used to preclude any remedies under the ADEA because of a post-termination event, namely, the rejection of a subsequent purported offer of reinstatement, notwithstanding a jury's verdict that the termination of Mr. Lightfoot months earlier was motivated by age discrimination.

Under McKennon, the post-termination conduct of the former employee was specifically assumed to involve wrongdoing. (513 U.S. at 361)

In the instant case, however, Mr. Lightfoot's rejection of the purported offer of reinstatement can not be considered as even approaching wrongdoing.

As the so-called reinstatement letter itself shows, (App. 102a-103a), the Market Manager position involved was one of the two remaining after the third, Lightfoot's had been eliminated through downsizing. (App. 102a-103a.) In other words, Mr. Lightfoot's position as the letter indicates had not even been in existence since April 27, more than six months earlier. The two people left had been doing the "remaining work."

The position being offered was that from which a relative neophyte, Mr. D.G. Roberts, nearly 25 years Lightfoot's junior, himself had resigned after the downsizing from three to two positions had already occurred. (App. 105a-106a)

On such facts as are shown in the letter itself (App. 105a-106a), whether the position was functionally different from the Lightfoot position that had been abolished months before would be a disputed fact issue requiring submission to a jury. Whether Roberts had resigned because of the unattractiveness or impossibility of performing satisfactorily in a work environment that had been irretrievably altered by the downsizing that had taken place would be evidence a jury should be permitted to consider in determining whether it was reasonable for Mr. Lightfoot to accept the purported offer of reinstatement.

The opinion in McKennon is very specific concerning the differences between the remedial provisions of the ADEA and Title VII, describing the former as "something of a hybrid" because of its utilization of the Fair Labor Standards Act, (513 U.S. at 357).

This step was entirely obviated by the decisions below which incorrectly made the assumption that severance pay, a fringe benefit earned not for current services, but vested as a result of years of prior services, and the loss of backpay for current services are the same thing.

The FLSA uses "wages" in the sense of earnings for services currently performed, not a fringe benefit such as "severance pay" incurred as an outgrowth of length of prior service for the employer.

As stated in McKennon, in ADEA cases, the beginning point in the formulation of a remedy "should be the calculation of backpay from the date of the unlawful discharge to the date

the new information was discovered." (513 U.S at 362)

The terminology used in the Fair Labor Standards Act does not involve what could remotely be considered to include "severance pay:" an employer who violates the statute "shall be liable" for "the payment of wages lost and an addition equal amount as liquidated damages." (29 U.S.C. § 216 (b) quoted at App. 112a; emphasis added.)

The distinction is an important one in the statutory scheme of the remedial provisions available under the ADEA in light of its specific provision for the doubling of unpaid "wages" as damages if the discriminatory acts are found to be "willful violations."

The provision for liquidated damages under the ADEA is not part of Title VII. The computation of "unpaid wages" and liquidated damages for the purpose of the ADEA is separate and distinct from remedies provided under Title VII.

The decisions below that equate severance pay to back pay for this purpose therefore has the effect of eliminating the liquidated damage provision of the ADEA for willful age discrimination.

The nullification of such an important part of the enforcement and remedial provisions of the ADEA urgently is in need of review as a consequence.

Further, the back pay liability of defendants goes back prior to Mr. Lightfoot's termination date since the applicable statute of limitations for willful violations is three years under the applicable statutory provisions (quoted at App. 111a), and during that period demotions and additional discriminatory acts occurred diminishing the back pay that Mr. Lightfoot should have

received.

Unlike the decisions below, other circuits have applied the continuing violation doctrine to reach such pre-termination discriminatory conduct. West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995), states:

> "Once the plaintiff has alleged sufficient facts to support use of the continuing violation theory, however, the 300-day filing period becomes irrelevant -- as long as at least one violation has occurred within that 300 days. Plaintiff may then offer evidence of, and recover for, the entire continuing violation. At that point as well, the Federal Rules of Evidence and the substantive law at issue, rather than the statutory filing period, should govern evidentiary determinations of the trial court." (Emphasis added.)

The petition therefore should be granted to review the disparity in these decisions from other Circuits and the decisions of the courts below.

See Waltman v. International Paper Co., 875 F.2d 468,476 (5th cir. 1989) ("The Meritor Savings Bank decision is relevant to the continuing violation theory because a hostile environment claim usually involves a continuing violation."); see also Harris v. Forklift Systems, Inc., 510 U.S. 17, 114 S.Ct 367 (1993) (considering acts spanning a two and one-half year period); Meritor Savings Bank, FSB v. Vinson et al., 477 U.S. 57, 106 S.Ct. 2399 (1986) (considering acts spanning four year period).

Finally, the provision for attorney's fees for a victim of age discrimination, as Mr. Lightfoot was found to be, is an exceedingly important part of the Fair Labor Standards Act remedies provided under the ADEA because it is mandatory, not discretionary. Under 29 U.S.C. §216, quoted at App. 110a -

111a: "The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant" (emphasis added), a remedy very much needed to bring such semblance of levelness to the playing field in this type of employment litigation.

29 U.S.C. § 626 (c) (1), quoted at App. 109a, states further that "Any person may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ." (Emphasis added.)

The fact that the remedy of attorney's fees is not available under the New York Human Rights Law makes it all the more important that this part of the remedial provisions of the ADEA be given effect, particularly in light of the deterrence objective emphasized in McKennon (513 U.S. 352, 362). See also Biggins v. Hazen Paper Co., 953 F.2d 1405, 1428 (1st Cir. 1992).

The net effect of the decisions below was to nullify the remedies made available by Congress for victims of age discrimination under the ADEA. The importance of granting the petition to review such issues therefore is apparent, and also consistent with the issuance of a writ to review such issues in McKennon. 513 U.S. 352.

III. THE IMPORTANCE OF REMEDIES UNDER ERISA FOR DISCRIMINATION SHOULD BE REVIEWED

The district court also used summary judgment to dismiss Mr. Lightfoot's claim for relief under Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1140, notwithstanding the fact that the statute makes it

> ". . . unlawful for any person to discharge. . . or discriminate against a [pension plan] participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan. . . . (App. 81a; emphasis added.)

This was affirmed on appeal. (21a-22a) However, the Second Circuit did not cite any case in which there was sufficient evidence before a jury to support a finding that the termination of Mr. Lightfoot had been unlawfully discriminatory.

Thus, the dismissal of Mr. Lightfoot's ERISA claim on summary judgment notwithstanding the evidence of the motivation of age bias in connection with his termination presents a situation that the Second Circuit ignored.

The importance of a remedy under ERISA therefore should be considered especially in view of the apparent inconsistency with this Court's decision in Hazen Paper Co., et al. v. Biggins, 507 U.S 604, 607-613, 113 S.Ct. 1701, 1705-7 (1993).

That such discriminatory motivation has wreaked havoc on the accrual of expected rights under pension plans has not escaped leading financial analysts, as shown in the recent "Pension Plans From Hell" feature in Barron's for August 18, 1997, p. 46.

The importance of the topic as analyzed in Barron's warrants consideration by this Court. In view of the following comment, claims asserted under Section 510 of ERISA to provide a remedy for such discriminatory abuses should not be buried by summary judgment dismissals that prevent the development of such issues at a trial (Barron's, 8/18/97, p.46):

"Companies will skirt or break the law as long as the incentives to get rid of people. . .will remain strong. Between 1993 and 1995 the government estimates that 9.4 million workers permanently lost their jobs. That's an all time high. Curiously, however, most of the same companies that downsized have more employees than they did before the process started."

* * * * *

"We must expect that companies push the legal envelope as far as possible, knowing that the odds of getting away with it are greatly in their favor." (Emphasis added.)

IV. THE COURT'S SUPERVISORY POWER SHOULD BE EXERCISED TO CONSIDER THE DISQUALIFICATION OF THE DISTRICT JUDGE

The affidavit of Mr. Lightfoot in support of his first request for disqualification of the District Judge is in the Appendix at 95a-104a.

The affidavit indicates that shortly before the first trial, the district judge put pressure on Mr. Lightfoot to settle the case for $100,000, a figure the judge indicated that he had reason to believe on the basis of ex parte discussions would be acceptable to defendants, notwithstanding the judge's knowledge that a settlement at that figure "would have entirely destroyed any economic benefit" to Mr. Lightfoot in having prosecuted the litigation. (App. 97a.) Mr. Lightfoot's affidavit further states (App. 99a-100a):

"(u) Because I refused to settle for $100,000 it is apparent to me that Judge Baer's figure of $75,000 was intended to punish me for exercising my jury trial rights instead of clearing his docket by settling the case. Judge Baer intended to deprive me of the verdict which the jury returned and put a value of the case which was 25 percent less than what he himself indicated would have been in his view a viable settlement figure after I had gone through the further time, effort, expense and risk of proceeding to try the case over an extended period of time.

"(v) Thus it is apparent that Judge Baer's Order and Opinion was not arrived at in good faith but an outgrowth of prejudice against me and should be vacated for that reason.

"(w) The punitive purpose of the Order and Opinion dated October 24, 1995, is made clear by the fact that, at the time he issued that Order and Opinion, he already was aware, based on my attorney's fees application, that the amount that I had invested in the case for attorney's fees was substantial, since nearly 3,000 hours of attorneys' time was involved.

"(x) Judge Baer therefore knew, based upon what I had said at the conference on June 21, 1995, that, considering what I had invested in the case in attorney's fees, I would be a substantial loser, near the end of my resources, at his figure of $75,000, after the trial, even though the jury strongly had found me to be a victim of age discrimination as set forth in the special interrogatories submitted to the jury . . . Thus the punitive intent of Judge Baer is obvious in the context of the discussions on June 21, 1995."

"The goal of [28 U.S.C.] section 455 (a) is to avoid even the appearance of partiality." Liljeberg v. Health Services Acquisition Corp., 486 U.S. 847, 860, 108 S.Ct. 2194, 2203 (1988) quoting Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983).

Judge Baer's ex parte statements demonstrated both a prejudicial attitude towards the merits of the case and personal animus against the plaintiff (97a-100a). The $100,000 settlement figure that Judge Baer proposed just before the trial was based upon information that he had received from the defendants. In granting remittitur, reducing the verdict from $750,000 to $75,000, therefore, the judge arbitrarily selected a figure derived from what defendants had previously stated to him would be accepted in ex parte communications.

An abuse of the judicial process and a violation of 28 U.S.C. 455(a) therefore occurred under Liteky v. United States, 510 U.S. 540 (1994), because the crucial $75,000 figure used by the district judge in the remittitur order involved information on a subject obtained by the judge from an extrajudicial source in the form of ex parte settlement discussions occurring just before the trial.

Commonwealth Coatings Corp. v. Continental Casualty Co. states: "any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias." 393 U.S. 145, 89 S. Ct. 337, 340, 21 L. Ed. 2d 301 (1968). See also Nicodemus v. Chrysler Corp., 596 F.2d 152, 157 (6th Cir. 1979); United States v. Robin, 553 F.2d 8, 10-11 (2d Cir. 1977) (en banc) (per curiam).

Disqualification is necessary to "preserve not only the reality but the appearance of the proper functioning of the judiciary as a neutral, impartial administrator of justice." United States v. Torkington, 874 F.2d 1441, 1447 (11th Cir. 1989).

The right to trial by an impartial judge "is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). To fulfill this requirement--and to avoid both bias and the appearance of bias--this Court has both supervisory authority and responsibility to see to it that district judges are disqualified in such circumstances. See Lewis v. Curtis, 671 F.2d 779, 789 (3d Cir.) cert. denied, 459 U.S. 880 (1982), which states: "impartiality and the appearance of impartiality in a judicial officer are the sine qua non of the American legal system." 671 F.2d at 789.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner
RICHARD HALL LIGHTFOOT

Dated: May 28, 1999

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 98-7166
Filed March 1, 1999
Issued as Mandate March 22, 1999

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the first day of March, one thousand nine hundred and ninety-nine.

Present: HONORABLE ELLSWORTH A. VAN GRAAFEILAND,
HONORABLE AMALYA L. KEARSE,
HONORABLE FRED I. PARKER,
Circuit Judges.

RICHARD HALL LIGHTFOOT,

Plaintiff-Appellant,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Defendants-Appellees.

Appearing for Appellant: Arthur M. Wisehart, Wisehart & Koch, N.Y., N.Y.

Appearing for Appellees: Joel E. Cohen, McDermott, Will & Emery, N.Y., N.Y.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on record from the United States District Court for the Southern Circuit of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Plaintiff Richard Hall Lightfoot appeals from a judgment of the United States District Court for the Southern District of New York, Harold Baer, Jr., *Judge*, awarding him $20,000 in compensatory damages against defendants Union Carbide Corporation ("Union Carbide") *et al.*, following a jury verdict in that amount on the retrial, following a prior appeal to this Court, *see Lightfoot v. Union Carbide Corp.*, 110 F.3d 898 (2d Cir. 1997) ("*Lightfoot I*"), of the damages issues on his state-

law claim of age discrimination. On appeal, Lightfoot contends principally that the district court impermissibly ordered a conditional remittitur to $75,000 of the first jury's verdict of $750,000. He also contends that he should have been permitted to amend his complaint following the remand in *Lightfoot I* in order to reinstate a previously dismissed claim and to add a new claim; that the court erroneously excluded certain evidence at the retrial; and that the district judge should have recused himself. Finding no merit in Lightfoot's contentions, we affirm.

Lightfoot's principal contention need not detain us long, for it was rejected in *Lightfoot I*, and we "will not overrule a prior decision of a panel of this Court absent a change in the law by higher authority or by way of an in banc proceeding of this Court," *Samuels v. Mann*, 13 F.3d 522, 526 (2d Cir. 1993), *cert. denied*, 513 U.S. 849 (1994); *see also In re Mediators, Inc.*, 105 F.3d 822, 828 (2d Cir. 1997); *United States v. Coffin*, 76 F.3d 494, 496 n.1 (2d Cir.), *cert. denied*, 517 U.S. 1147 (1996). A prior panel's ruling on an issue that was briefed, argued, and addressed by the parties creates a binding precedent constraining future panels. *See, e.g., Getty Petroleum Corp. v. Bartco Petroleum Corp.*, 858 F.2d 103, 113 (2d Cir. 1988), *cert. denied*, 490 U.S. 1006 (1989); *Korwek v. Hunt*, 827 F.2d 874, 877 (2d Cir. 1987).

In *Lightfoot I*, Lightfoot challenged the district court's remittitur order, contending, *inter alia*, that the court's reduction of the verdict constituted error as a matter of law, that it violated his right to a jury trial, that the size of the verdict was supported by the evidence, and that the district court erred by not offering him the option of a new trial as an alternative to remittitur. He argued that the district court's order "reducing the damages awarded by the jury should be vacated and the damage award of the jury reinstated." (Lightfoot brief on appeal in *Lightfoot I*, dated March 1, 1996, at 48.) We considered all of Lightfoot's contentions, and we found merit only in the contention that "the district court erred in granting defendants' motion for a remittitur without offering Light-

foot the option of a new trial on damages," *Lightfoot I*, 110 F.3d at 915, and we remanded "to allow Lightfoot the opportunity to exercise this option," *id.* We did not find any other error, and we did not grant Lightfoot's request for reinstatement of the judgment. To the extent that Lightfoot makes arguments on the present appeal that he made to the *Lightfoot I* panel, they have been rejected and we see no reason to revisit them. To the extent that Lightfoot suggests that any of his present challenges to the pre-*Lightfoot I* remittitur order were not made on his prior appeal, those challenges have been waived. *See, e.g., County of Suffolk v. Stone & Webster Engineering Corp.*, 106 F.3d 1112, 1117 (2d Cir. 1997) (a decision made at a previous stage of litigation, which could have been challenged in the ensuing appeal but was not, becomes the law of the case); *Fogel v. Chestnutt*, 668 F.2d 100, 109 (2d Cir. 1981) ("It would be absurd that a party who has chosen not to argue a point on a first appeal should stand better as regards the law of the case than one who had argued and lost."), *cert. denied*, 459 U.S. 828 (1982).

Lightfoot's other contentions with respect to pre-*Lightfoot I* rulings of the district court are similarly rejected for the above reasons.

We also find no merit in the contention that the district court, following the remand in *Lightfoot I*, should have allowed Lightfoot to amend his complaint to reinstate a previously dismissed claim under the New York City Human Rights Law or to plead a new claim for retaliation. The liability phase of the case had ended, and *Lightfoot I* remanded for a partial new trial—if plaintiff chose that option over the remittitur that would have ended the entire case—solely on the issue of damages. The denial of Lightfoot's motion to add additional claims was well within the district court's discretion.

Nor is there merit in Lightfoot's evidentiary challenges. The trial court "has wide discretion in controlling the admissibility of testimony and other evidence, and absent a demonstration of abuse of discretion, its rulings will not be

disturbed." *Zahra v. Town of Southold*, 48 F.3d 674, 686 (2d Cir. 1995); *see also Healey v. Chelsea Resources, Ltd.*, 947 F.2d 611, 619-20 (2d Cir. 1991). "The same standard of review applies to a district court's evidentiary rulings on expert testimony." *Raskin v. Wyatt Co.*, 125 F.3d 55, 66 (2d Cir. 1997). The trial court acts as a gatekeeper with respect to expert testimony, properly admitting only such testimony as would help the jury understand the evidence or determine a fact at issue. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 591-93 (1993); *Raskin v. Wyatt Co.*, 125 F.3d at 66 & n.5; *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1042-43 (2d Cir. 1995). Thus, the court must "ensur[e] that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. at 597. Where the record indicates that the expert failed to consider necessary factors or that his analysis rests on faulty assumptions, the trial court has discretion to exclude his proffered testimony for lack of probative value. *See, e.g., Raskin v. Wyatt Co.*, 125 F.3d at 67-68.

We see no abuse of discretion in the trial court's evidentiary rulings at Lightfoot's retrial of the damages issues. Lightfoot argues, *inter alia*, that the court could not properly exclude the expert testimony of Dr. Cellura because Cellura was allowed to testify at the first trial. We are unpersuaded for several reasons. At the first trial Cellura testified as a lay witness; this did not mean that he must be allowed to testify at the retrial as an expert. Further, even had he testified as an expert at the first trial, his testimony would not necessarily have been relevant at the retrial, for the first trial encompassed issues of both damages and liability, whereas the retrial was limited to damages. Finally, Lightfoot sought to have Cellura testify to "the level of compensation that [Lightfoot] should have received at Union Carbide . . . before his termination became tainted by age discrimination" (Lightfoot brief on the present appeal, dated May 13, 1998, at 25). That testimony was properly excluded, as it would have been relevant only to Lightfoot's claim that he was denied salary

increases at Union Carbide, a claim previously rejected by both the district court and this Court in *Lightfoot I*, 110 F.3d at 906-08.

It was also well within the trial court's discretion to exclude the proffered testimony of an accountant as to the difference between the salary Lightfoot would have received at Union Carbide, had he not been terminated, and what he subsequently earned as a consultant. Such a calculation is essentially one of front pay, to which Lightfoot was not entitled. The proffered evidence did not bear on the type of damages he was entitled to recover. Further, the accountant's testimony was based on the flawed assumption that Lightfoot had been improperly denied salary upgrades while still employed by Union Carbide—a basis for recovery that, as discussed above, had been rejected.

Finally, Lightfoot's claim that the district judge should have recused himself is meritless. Though a judge must "disqualify himself in any proceeding in which his impartiality might reasonably be questioned," 28 U.S.C. § 455(a), Lightfoot presented no basis for disqualification here. The adverse rulings of law and attempts to encourage settlement provided no reasonable basis for questioning the judge's impartiality. We see no abuse of discretion, *see, e.g., Diamondstone v. Macaluso*, 148 F.3d 113, 120 (2d Cir. 1998); *United States v. Conte*, 99 F.3d 60, 65 (2d Cir. 1996), in the denial of Lightfoot's recusal motion.

We have considered all of Lightfoot's contentions on this appeal and have found them to be without merit. The judgment of the district court is affirmed.

FOR THE COURT:

CAROLYN CLARK CAMPBELL, Clerk

by: /s/ LUCILLE CARR

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 CIVIL 6411 (HB)
Filed January 20, 1998

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION; A.W. LUTZ; W.E. SHACKELFORD,

Defendants.

JUDGMENT

A Jury Trial before the Honorable Harold Baer, United States District Judge, having begun on January 5, 1998, and at the conclusion of the trial the jury having returned a verdict in favor of the plaintiff in the sum of $20,000.00 in compensatory damages, it is,

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the sum of $20,000.00 in compensatory damages as against the defendants.

Dated: New York, New York
January 18, 1998

So Ordered:

/s/ HAROLD BAER, JR.
U.S.D.J.

JAMES M. PARKISON
Clerk of Court

BY: /s/ JOHN S. HAGEN
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos: 95-9206, 95-9258
Filed March 27, 1997
Issued as Mandate April 17, 1997

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 27th day of March, one thousand nine hundred and ninety-seven.

Present: HON. AMALYA L. KEARSE
HON. JOSEPH M. MCLAUGHLIN
*Circuit Judges**

RICHARD HALL LIGHTFOOT,

Plaintiff-Appellant-Cross-Appellee,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemical Division,

Defendants-Appellees-Cross-Appellants.

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* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996; the appeal is being decided by the remaining two members of the panel, who are in agreement, See 2d Cir. R. 0.14(b).

Appeals from United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED, and DECREED that the order of said district court be and it hereby is affirmed in part, vacated in part, and remanded to the said district court for further proceedings in accordance with the opinion of this court.

For the Court
GEORGE LANGE III, Clerk

by: /s/ BETH J. MEADOR
Beth J. Meador
Administrative Attorney

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1710, 1881—August Term, 1995

(Argued: June 16, 1996 Decided: March 27, 1997)

Docket Nos. 95-9206(L), 95-9258(XAP)

RICHARD HALL LIGHTFOOT,

Plaintiff-Appellant-Cross-Appellee,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W.E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Defendants-Appellees-Cross-Appellants.

Before:

KEARSE and MCLAUGHLIN,

*Circuit Judges.**

---

* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996; the appeal is being decided by the remaining two members of the panel, who are in agreement. *See* 2d Cir. R. 0.14(b).

Plaintiff appeals from an order of the United States District Court for the Southern District of New York granting defendants' motion for partial summary judgment. Plaintiff also contends that the trial court erred in denying his claim for attorney's fees and in granting defendants' motion for a remittitur of the jury's award of damages. Defendants cross-appeal the court's denial of their motion for a new trial on the grounds that the jury's verdict was against the weight of the evidence and that various errors at trial rendered the proceedings fundamentally unfair to defendants.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.

ARTHUR M. WISEHART, New York, New York (Wisehart & Koch, New York, New York, of counsel) *for Plaintiff-Appellant-Cross-Appellee*.

JOEL E. COHEN, New York, New York (Julie Y. Chen, Nancy I. Solomon, McDermott, Will & Emery, New York, New York, of counsel) *for Defendants-Appellees-Cross-Appellants*.

MCLAUGHLIN, *Circuit Judge*:

Plaintiff appeals from an order entered May 12, 1994 in the United States District Court for the Southern District of New York (Patterson, *J.*) granting summary judgment to defendants, dismissing all but one of plaintiff's

claims. Defendants cross-appeal, attacking the verdict as against the weight of the evidence and the entire trial as fundamentally unfair.

BACKGROUND

Plaintiff Richard Lightfoot was hired by defendant Union Carbide in 1959 as a chemical engineer in Carbide's Charleston, West Virginia facility. Over the following thirty-three years Lightfoot advanced fairly steadily in the company, taking on increasingly challenging job responsibilities with corresponding increases in his salary. In 1968 Lightfoot was transferred to Carbide's New York office, where he assumed a product-management position. In 1973 he was promoted to Marketing Manager, and six years later he became Business Manager in Carbide's Glycol Ethers group, within the Industrial Chemicals Division ("ICD"). Lightfoot was eventually asked to manage the Ethylene Amines group, which was also part of the ICD, and his salary grade was subsequently raised from Grade 16 to Grade 17. Defendant W.E. Shackelford, Vice-President of the ICD, promoted Lightfoot to Business Director of the Ethylene Amines group in 1988, but Lightfoot remained at salary Grade 17 even after the promotion.

According to defendants, Shackelford and Glen Kraft, another ICD vice-president, became dissatisfied with Lightfoot's work soon after his promotion to Business Director. Shackelford made annual performance appraisals of Lightfoot between 1987 and 1990 that were generally positive, but also discussed areas in which Lightfoot could improve. The 1988 review, for instance, noted several areas where Lightfoot's group was behind

schedule; and in the 1989 review Shackelford wrote that "[Lightfoot] needs improvement in the area of conceptualizing, communicating and causing to happen his ideas as to where the business should go . . . [;] he also has real opportunity to improve in the area of interpersonal skills."

In May 1990 Lightfoot was assigned to the position of Manager of Special Projects for the Ethylene Oxide Derivatives Department ("EOD") within ICD. Five months later he was reassigned as Marketing Manager for the Surfactants group within EOD. Throughout this period Lightfoot's salary was mired at Grade 17.

In the early 1990s, Carbide purchased a subsidiary chemical business from Rohm and Haas Chemical Company. In connection with that purchase, Carbide hired several Rohm and Haas employees who were familiar with the products and customers of this new business. Shackelford testified that the ICD's focus subsequently diverted from development of new products to maximizing the potential of the newly acquired product line. According to defendants, this shift in priorities necessitated a corresponding reduction of marketing staff. In a meeting (the "forced-ranking" meeting) with Harry Short, a business director, Robert Cellura, National Sales Manager of the EOD, and Robert Kisker, Business Director of Amines, Shackelford asked all the participants to rate the twelve marketing employees in Lightfoot's business group on a scale of one to five in several performance categories. They then ranked the employees according to their total scores.

Lightfoot and another marketing employee, Michael Goebel, received the lowest overall scores. Defendants testified that Lightfoot's poor ranking was principally

due to his low scores for "reassignment potential," reflecting Shackelford's previous, unsuccessful attempts to place Lightfoot in various positions outside his group.

On April 27, 1992, Lightfoot was notified that he would be terminated as part of a reduction-in-force program. As severance, he received his full pay and benefits until February 1993. At the time of the forced-ranking meeting, Lightfoot was fifty-six years old. Goebel, who was not terminated, was thirty-nine. Defendants testified that Goebel was retained despite his equally low score because his supervisor, Kisker, specifically lobbied on his behalf.

Lightfoot filed a discrimination charge with the EEOC on May 14, 1992, and in August 1992 he filed suit in the United States District Court for the Southern District of New York against Carbide, Shackelford and A.W. Lutz, President of the ICD. Lightfoot's complaint asserted claims for age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, the New York State Human Rights Law ("NYSHRL"), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law ("NYCHRL"), N.Y.C. Admin. Code § 8-502 (1991). Lightfoot also included a claim of discriminatory termination in violation of the Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* ("ERISA"), and state-law claims for breach of an implied contract of permanent employment, recovery in quantum meruit or unjust enrichment of Carbide through products invented by Lightfoot during his employment by Carbide, and a claim of tortious interference with contract against Shackelford individually.

In a letter dated December 3, 1992, while this suit was pending, Shackelford informed Lightfoot that another Market Manager had resigned, and he offered Lightfoot "resumption of the Market Manager position [he] held prior to its elimination," on the same terms and conditions as existed at the time of his termination and with no loss of service credit. Lightfoot never responded to the letter, and in February 1993 he accepted a position with CRI, Inc., a consulting firm in the chemical industry.

In July 1993 defendants sought summary judgment dismissing Lightfoot's complaint; Lightfoot filed a cross-motion for partial summary judgment on his claims of age discrimination, quantum meruit and unjust enrichment. In an Order and Opinion dated May 12, 1994, Judge Robert P. Patterson Jr. denied Lightfoot's cross-motion and granted defendants partial summary judgment as to all but the ADEA and NYSHRL claims of age discrimination. The court also held that Lightfoot's rejection of Carbide's December 1992 offer of reinstatement barred Lightfoot from recovering back pay or front pay should he prevail in his age discrimination claims. Lightfoot moved for reargument of the summary judgment motions and later asked the court to vacate and amend its order of May 12; the court denied both motions.

In February 1995 the case was reassigned to Judge Harold Baer. In a Memorandum Order dated May 31, 1995, Judge Baer ruled that evidence of Lightfoot's participation in the invention of products for Carbide would not be admissible because the quantum meruit and unjust-enrichment claims had already been dismissed. In an oral ruling (never memorialized in writing) before

counsel's opening statements at trial, the court further held that Lightfoot's claims for damages arising from Carbide's failure to increase his salary grade in 1988 were time barred because Lightfoot failed to file a claim with the EEOC within 300 days of the alleged discriminatory act. Having determined that Lightfoot was no longer eligible for any remedy available under the ADEA, the court concluded that the ADEA claim must also be dismissed and that plaintiff's "sole remaining claim[was one for] compensatory damages under the New York State Executive Law."

Lightfoot's remaining state-law claim was tried before a jury in June 1995. The court reminded the jury that the only claim before it was the state-law claim and that the only remedy available to Lightfoot was an award of compensatory damages for mental anguish or humiliation suffered as a result of Carbide's discriminatory acts. On June 29, 1995, the jury returned a $750,000 verdict for the plaintiff.

The court entered judgment in favor of Lightfoot on July 26, 1995, and on August 5 Lightfoot moved for attorney's fees, expenses, and post-judgment interest pursuant to Rule 54(d) (2) of the Federal Rules of Civil Procedure and § 626(b) of the ADEA. On August 7 defendants filed a motion for either a complete new trial, a new trial on the issue of damages only, or a remittitur of the damage award. In an Order and Opinion dated October 24, 1995, the district court denied plaintiff's motion for fees and expenses but granted his request for post-judgment interest. The court also denied defendants' motion for a new trial but reduced the damage award to $75,000.

Lightfoot subsequently filed a motion seeking disqualification of Judge Baer on grounds of bias and vacatur of the order of October 24 reducing the jury's damage award. The court denied both motions. This appeal followed.

Lightfoot now claims on appeal that the district court erred in dismissing his claims (1) for back and front pay; (2) for Carbide's failure to pay him adequate compensation when he was promoted several years before his termination; and (3) for unjust enrichment arising from Lightfoot's assignment of invention patents to Carbide. He also asserts that the district court erroneously denied his claims for attorney's fees and that the court's reduction of damages from $750,000 to $75,000 denied his right to a jury trial.

Carbide claims on its cross-appeal that the district court erred in denying its motion for a new trial on the grounds that the verdict was against the weight of evidence and other prejudicial errors at trial.

DISCUSSION

A. District Court's Grant of Partial Summary Judgment

1. State-law claim of unjust enrichment

Lightfoot contends that during his years of employment by Carbide he participated in the development of several "new products and lines" and that he was promised "additional compensation" for these "inventions." In his complaint, he sought recovery of Carbide's

profits from these inventions under state-law principles of unjust enrichment.

Defendants answer that Lightfoot's claim is precluded by a Memorandum of Employee's Agreement (the "Agreement") in which Lightfoot agreed to assign to Carbide any inventions made in the course of his employment by Carbide. Agreeing with defendants, the district court granted defendants' summary judgment motion dismissing the unjust-enrichment claim. Lightfoot argues on appeal that summary judgment was inappropriate because the terms of the Agreement are ambiguous, and thus there is a genuine issue of material fact.

It is true that under the quasi-contractual doctrine of unjust enrichment, courts may infer the existence of an implied contract "to prevent one person who has obtained a benefit from another . . . from unjustly enriching himself at the other party's expense." *Chadirjian v. Kanian*, 506 N.Y.S.2d 880, 882 (App. Div. 1986) (citations omitted). Such an agreement will not be implied, however, "where there is a valid express agreement between the parties which explicitly covers the same specific subject matter for which the implied agreement is sought." *Id.* Lightfoot concedes that in 1959 he signed the following Agreement:

> In consideration of my employment by Union Carbide Corporation . . . in a capacity which makes available to me confidential information concerning the technology and trade secrets on which the Corporation's business depends, I agree . . . [t]o assign to Union Carbide Corporation all inventions made by me, alone or jointly with others, in the course of such employment, relating to the business of the

> Corporation or resulting from tasks specifically assigned to me by the Corporation.
>
> . . . .
>
> This Agreement does not, of course, bind either party to any specific period of employment.

Lightfoot signed the identical agreement in 1986.

Plaintiff finds these agreements ambiguous. *See Seiden Assocs. v. ANC Holdings*, 959 F.2d 425, 428 (2d Cir. 1992) ("Where language used is susceptible to differing interpretations . . . and where there is relevant extrinsic evidence of the parties' actual intent, the meaning of the words become[s] an issue of fact and summary judgment is inappropriate."). Contract terms are considered ambiguous if they are "capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Nowak v. Ironworkers Local 6 Pension Fund*, 81 F.3d 1182, 1192 (2d Cir. 1996).

Lightfoot's cavil with the Agreements is that they do not contain any provision specifying the effect of an employee's termination on any claims he might later assert. Because contract terms are construed against the drafter, *see Monica Textile Corp. v. S.S. Tana*, 952 F.2d 636, 643 (2d Cir. 1991), he argues, silence in the Agreements should not be interpreted as a waiver of his "post-employment claim of damages for unjust enrichment arising from . . . wrongful termination as a result of age discrimination." Appellant's Brief at 44.

This argument conflates ambiguity and omission. The plain language of the Agreements is clear: Lightfoot agreed to an unconditional assignment of any and all inventions created by him while working for Carbide. The unconditional assignment is not rendered ambiguous by the parties' failure to anticipate specifically how Lightfoot's employment might end. Thus, while Carbide may indeed have been enriched by Lightfoot's efforts, we cannot say that such enrichment was unjust. There is no genuine issue of material fact on the issue of unjust enrichment, and the court's grant of summary judgment on this issue was appropriate.

2. Claims under ERISA

The district court also granted summary judgment dismissing Lightfoot's claim under ERISA. Section 510 of ERISA provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary [of an employee benefit plan] . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ." 29 U.S.C. § 1140. There is, however, no cause of action under section 510 where the loss of pension benefits "was a mere consequence of, but not a motivating factor behind, a termination of employment." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988). To defeat summary judgment Lightfoot had to adduce some evidence from which a reasonable jury could conclude that Carbide terminated his employment with the intent to reduce his pension benefits.

Although Lightfoot's complaint alleged a "pattern or practice of age discrimination in employment intended to deprive older . . . employees of opportunity to opti-

mize the benefits available to them," he has come forward with no specific facts to support this allegation. He argues on appeal that pre-termination discrimination against him "must" have resulted from Carbide's desire to interfere with his pension benefits because it had that effect. This is a textbook illustration of the *post hoc ergo propter hoc* fallacy. *See Dister*, 859 F.2d at 1117 n.1 ("[M]ere cost savings and proximity to benefits are [in]sufficient . . . to create a genuine issue of fact requiring a trial"); *Humphreys v. Bellaire Corp.*, 966 F.2d 1037, 1044 (6th Cir. 1992) (citing *Dister*). Where an employee's ERISA claim is based only on a claim that the employee has been deprived of the opportunity to accrue additional benefits through more years of employment, "a prima facie case requires some additional evidence suggesting that pension interference might have been a motivating factor." *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 348 (3d Cir. 1990). Lightfoot has presented no such evidence, and summary judgment was appropriate.

3. Dismissal of pre-termination claims

Lightfoot insists that he should have received a pay raise in 1988 when he was promoted to Business Director. Under the ADEA, a plaintiff in a "deferral state" such as New York must first file an administrative charge with the EEOC within 300 days of the alleged violation in order to preserve his right to bring a lawsuit. *See* 29 U.S.C. §§ 626(d), 633(b). A claim under the NYSHRL must then be filed within three years of the alleged discriminatory act. *See Murphy v. American Home Prods. Corp.*, 448 N.E.2d 86, 92-93 (N.Y. 1983).

To maintain his pay-disparity claim, Lightfoot would have had to file a charge with the EEOC within 300 days of his 1988 promotion and also file his complaint in federal court within three years of that promotion. He missed both of these deadlines. The district court thus properly dismissed the claim as time barred under both the ADEA and the NYSHRL.

Lightfoot attempts to circumnavigate the EEOC filing deadline by arguing that defendants' failure to pay him at an appropriate salary level should be treated as a continuing violation. We have recognized a continuing-violation exception to both Title VII and ADEA cases. Under the exception, a plaintiff who files a timely EEOC charge about a particular discriminatory act committed in furtherance of an ongoing policy of discrimination extends the limitations period for all claims of discriminatory acts committed under that policy even if those acts, standing alone, would have been barred by the statute of limitations. *See Lambert v. Genesee Hosp.*, 10 F.3d 46, 53 (2d Cir. 1993); *Cook v. Pan Am. World Airways*, 771 F.2d 635, 646 (2d Cir. 1985). The continuing-violation exception applies where there is evidence of specific discriminatory practices, such as the repeated use of discriminatory seniority lists or employment tests. *See Lambert*, 10 F.3d at 53; *Association Against Discrimination in Employment, Inc. v. City of Bridgeport*, 647 F.2d 256, 274-75 (2d Cir. 1981). Discrete incidents of discrimination that are unrelated to an identifiable policy or practice, on the other hand, "will not ordinarily amount to a continuing violation," unless such incidents are specifically related and are allowed to continue unremedied for "so long as to amount to a discriminatory policy or practice." *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708, 713 (2d Cir. 1996).

Lightfoot contends that between 1988 and his termination in 1992 he was repeatedly "demoted," and his pay grade remained frozen. He argues that the denial of a pay-grade increase, the alleged demotions, and his termination were part of an ongoing policy of "victimizing" older employees. Although the mere allegation of the existence of such a policy would be sufficient to withstand a challenge for failure to state a claim, something more is required to avoid summary judgment on the issue. Summary judgment is designed to pierce the pleadings to flush out those cases that are predestined to result in a directed verdict. Lightfoot has presented no evidence to support his claim of a discriminatory policy or a connection between his job reassignments and a discriminatory animus.

If Lightfoot was entitled to a pay raise because of the added responsibilities of his new position, the entitlement arose at the time of his promotion. "Completed acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing' nature." *Malarkey v. Texaco*, 559 F. Supp. 117, 121 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 674 (2d Cir. 1983) (per curiam) (affirming on grounds of failure to state a claim). Lightfoot's attempt to characterize as a continuing violation Carbide's alleged failure to compensate him adequately is therefore unavailing.

Lightfoot next argues that Carbide's failure to offer him adequate compensation should nevertheless be considered a continuing violation because Lightfoot continued to feel the effects of the lower pay up to the time he was terminated and because another manager was later promoted to the business director position at a

higher salary. This position is clearly without merit under *Malarkey*. *See* 559 F. Supp. at 121. A continuing violation is not established merely because an employee continues to feel the effects of a discriminatory act on the part of the employer. To hold otherwise would render meaningless the time limitations imposed on discrimination actions.

4. Back and front pay: the Reinstatement Letter

Lightfoot argues that summary judgment was improperly granted because there are genuine issues of fact as to whether Lightfoot acted reasonably in declining Carbide's offer of reinstatement in December 1992.

In *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982), the Supreme Court held that when an employer makes an unconditional offer to reinstate an employee terminated as a result of discrimination, the employee's rejection of that offer forecloses any claim for future front pay and tolls the continuing accrual of back-pay liability under Title VII of the Civil Rights Act of 1964. *Id.* at 227. Back pay is tolled as of the date of the employee's rejection. *Id.* The Court based its holding in *Ford* on the statutory duty of a Title VII complainant to mitigate damages, *see* 42 U.S.C. § 2000e-5(g), and the statute's underlying legislative purpose to "make the victims of unlawful discrimination whole by restoring them so far as possible . . . to a position where they would have been were it not for the unlawful discrimination." *Id.* at 230 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975)) (internal quotation marks omitted).

The NYSHRL substantially tracks Title VII, both in its requirement that plaintiffs mitigate their damages by seeking and accepting alternative employment, *see Ryan*

v. New York State Thruway Auth., 889 F. Supp. 70, 80-81 (N.D.N.Y. 1995) (citations omitted), and in the legislative purpose behind the law, *see* N.Y. Exec. Law § 290(3) (describing purpose of article as, inter alia, "to eliminate and prevent discrimination in employment"). The rationale of *Ford*'s "unconditional offer" rule thus supports the application of that rule to NYSHRL plaintiffs as well as those seeking relief under Title VII.

Lightfoot maintains that he should not have had to accept the offer to resume his old job as Market Manager on the same terms and conditions as existed when he was fired because the salary he had been getting as Market Manager had been affected by Carbide's prior discriminatory actions, and he was entitled to a higher salary. That, however, is not the law. To toll the accrual of back-pay liability, an employer need only offer reinstatement to "a job substantially equivalent to the one he was denied," *Ford*, 458 U.S. at 232, not a job equivalent to the one to which the employee must prove he was entitled if he is to prevail in his suit. In short, an employer is not required to "insure the claimant against the risk that the employer might win at trial." *Id.*

Lightfoot also suggests that Carbide's offer was made in bad faith as part of a "maneuver to put Lightfoot back under the power of defendant Shackelford where he could be subjected to further harassment until a more propitious scenario for his termination could be devised." Appellant's Brief at 35. Although we are required, in reviewing a motion for summary judgment, to view the evidence in the light most favorable to the nonmoving party, and to draw all inferences in favor of that party, *see Yerdon v. Henry*, 91 F.3d 370, 375 (2d Cir. 1996), Lightfoot cannot defeat summary judgment with

his wholly unsupported claims that there was an ulterior motive behind the offer, *see Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) ("[A] party opposing a properly supported motion for summary judgment may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." (quotations and citations omitted)). Lightfoot has failed to set forth anything concrete to support his position that the unconditional offer of employment was a ploy.

Lightfoot further contends that his rejection of Carbide's offer was reasonable because (1) he had already agreed to accept a position with a consulting company and (2) the stress of returning to work for Carbide (particularly under Shackelford) would have imperiled his health and well-being.

It is a matter of law that a commitment to a new employer does not preserve the employee's right to recover back pay for discriminatory termination from a previous employer. *See Ford*, 458 U.S. 234-36 ("The claimant who [rejects an offer of reinstatement in favor of remaining in a replacement job] does so . . . not because [the previous job] provides inadequate compensation, but because the value of the replacement job outweighs the value of the defendant's job supplemented by the prospect of full court-ordered compensation.").

As to Lightfoot's second point, although Lightfoot raised the issue of his medical condition in an affidavit attached to his original motion papers, he did not at that time present the district court with a physician's affidavit to support his claim. Instead, Lightfoot later attempted to introduce the affidavit of Dr. Stanley Portnow in a motion to vacate and amend the court's order

granting defendants' motion for summary judgment. The district court properly declined to consider Dr. Portnow's affidavit, as it had been in Lightfoot's possession for two years before the court's order and therefore was not "newly discovered evidence" that might have justified reconsideration of the court's decision.

Finally, Lightfoot contends that under Rule 408 of the Federal Rules of Evidence the reinstatement letter should not have been considered. Rule 408 bars the admission of statements and conduct made "in the course of compromise negotiations." *See Pierce v. F.R. Tripler & Co.*, 955 F.2d 820, 826-29 (2d Cir. 1992) (affirming trial court's exclusion of evidence of reinstatement offer made during settlement negotiations). By definition, an unconditional offer may not require the employee to abandon or modify his suit, and no such request was made by defendants. The offer therefore cannot be considered an offer of settlement or compromise.

In sum, because Lightfoot continued to receive his full salary and benefits as severance pay through February 1993, he cannot recover back pay for the period between his termination in April 1992 and his rejection of the offer of reinstatement in December 1992. Because his rejection of Carbide's offer foreclosed his claims to back pay and front pay after December 1992, the district court properly granted Carbide summary judgment on all of Lightfoot's claims for back and front pay.

5. Claims under the ADEA

There is confusion in the record as to whether the district court actually granted defendants summary judgment dismissing Lightfoot's claim under the ADEA, and, if it did not, whether it should have. In his order of May

12, 1994, Judge Patterson denied defendants' motion for summary judgment as to Lightfoot's claims under the ADEA and NYSHRL. In a ruling from the bench immediately before opening statements at the trial, Judge Baer noted that during a conference with counsel on June 20 he had resolved the issue of pre-termination damages against Lightfoot. Judge Baer concluded that in light of his decision denying pre-termination damages and Judge Patterson's earlier dismissal of claims for back and front pay, Lightfoot no longer had a viable claim for compensable damages under the ADEA. In the absence of an available remedy, the court granted defendants summary judgment dismissing Lightfoot's ADEA claim.

Lightfoot argues on appeal, however, that the court's dismissal of his claim was without effect because the court failed to enter the order of dismissal in the case docket. Rule 6(a) of the Civil Rules of the Southern District of New York provides in pertinent part:

> (a) A memorandum signed by the judge of the decision on a motion that does not finally determine all claims for relief shall constitute the order unless the memorandum directs the submission or settlement of an order in more extended form.
>
> The notation in the appropriate docket of such memorandum, or of an oral decision which does not direct the submission or settlement of an order in more extended form, shall constitute the entry of the order.

Lightfoot argues that because Judge Baer's order dismissing his ADEA claim was not properly entered in the docket pursuant to Rule 6(a), it is a nullity. Lightfoot cites no authority for this argument and we are not inclined to adopt so draconian a rule.

Rule 6(a) is a ministerial rule of procedure, intended to ensure that case dockets are properly maintained as useful sources of information for the litigants and court personnel. Where a court's oral order is clearly stated and both parties are present, there is no harm in overlooking the court's failure to comply scrupulously with the rule. On these facts, the harsh application of the rule urged by Lightfoot is required neither by considerations of fairness nor the interest of judicial economy.

Lightfoot's final argument is that even if the court was correct in its determination that he lacked a viable claim for damages under the ADEA, his claim should not have been dismissed; rather, the court could have granted equitable relief. The ADEA expressly authorizes courts to grant claimants "such legal or equitable relief as may be appropriate to effectuate the purposes of [the act], including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for [compensatory damages]." 29 U.S.C. § 626(b); *see also Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984) (affirming award of front pay under ADEA).

In his complaint Lightfoot sought only money damages and "such other and further relief as to this Court may seem just and proper." While this general, ritualistic prayer for additional relief might have entitled Lightfoot to some form of equitable relief after he had established his claim under the ADEA, *see* Fed. R. Civ. P. 54(c), this boilerplate language is insufficient to defeat summary judgment where the relief specifically requested by the plaintiff is unavailable as a matter of law. In this case Lightfoot cannot say even now what equitable relief would have been appropriate. His rejection of Carbide's

offer indicates that reinstatement was not a viable form of relief. He mentions injunctions in his brief but does not specify what activity ought to have been enjoined. In short, his argument amounts to a claim that so long as some form of relief was conceivable, even if he himself cannot articulate what that relief might be, his claim ought not to have been dismissed. We disagree, and thus conclude that summary judgment was properly granted.

B. Carbide's Motion for a New Trial

1. Verdict against the weight of the evidence

Defendants protest that the jury's verdict was contrary to "the great weight of the evidence." The denial of a motion to set aside a verdict as against the weight of the evidence, however, is not subject to appellate review. *Stonewall Ins. Co. v. Asbestos Claims Management Corp.*, 73 F.3d 1178, 1199 (2d Cir. 1995), *modified*, 85 F.3d 49 (2d Cir. 1996).

The task of reviewing and weighing all of the evidence presented at trial simply imposes too great a burden on the appellate court. *Id.* Accordingly, while defendants were "entitled to argue to the trial judge that the verdict [was] against the weight of the evidence . . . the denial of that challenge is one of those few rulings that is simply unavailable for appellate review." *Id.* Similarly, defendants may not obtain review of the denial of a new trial on the ground that the jury's damage award was against the weight of the evidence. *See Haywood v. Koehler*, 78 F.3d 101 (2d Cir. 1996) (applying *Stonewall* to preclude review of denial of a new trial where jury found defendants liable for use of excessive force but awarded no damages).

2. Trial errors

Defendants contend that various evidentiary errors at trial rendered the proceeding fundamentally unfair to them. They point to the following: (1) allowing one of Lightfoot's witnesses, Dr. Cellura, to testify as an expert that age was a factor in Lightfoot's termination, that there was age discrimination at Carbide, and that Carbide took a particular interest in young, talented people; (2) permitting Lightfoot's counsel to question a witness about Carbide's profits and "emissions problems" at Carbide plants in West Virginia and Bhopal; and (3) allowing Lightfoot's counsel to discuss specific dollar figures in his closing argument on damages.

A motion for a new trial " 'ordinarily should not [be granted] unless [the trial court] is convinced that the jury has reached a seriously erroneous result or that the verdict is a miscarriage of justice.' " *Hygh v. Jacobs*, 961 F.2d 359, 365 (2d Cir. 1992) (quoting *Smith v. Lightning Bolt Prods., Inc.*, 861 F.2d 363, 370 (2d Cir. 1988)). A trial judge's decision to grant or deny such a motion is reviewed for abuse of discretion. *Song v. Ives Labs., Inc.*, 957 F.2d 1041, 1047 (2d Cir. 1992).

(a) Testimony of Dr. Cellura

Dr. Robert P. Cellura, who was employed by Carbide from 1976 to 1992, testified against Carbide. Cellura participated in the forced-ranking meeting that resulted in Lightfoot's termination. On redirect examination, Lightfoot's counsel asked Cellura whether he believed that any factor other than Lightfoot's performance influenced the decision to terminate Lightfoot. Cellura testified that he believed age discrimination had been involved, pointing to three factors: (1) a decline in the

average age of Lightfoot's group and of all of Carbide's business directors after the reorganization; (2) the decision to terminate Lightfoot rather than a similarly ranked younger employee; and (3) a decline in the average age of Carbide's highest-paid employees. Defendants contend that this testimony should have been excluded because it lacked probative value, was not based on Cellura's personal knowledge, and went to the ultimate issue in the case.

The Federal Rules of Evidence allow a lay witness to testify in the form of an opinion, provided such testimony "is limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." Fed. R. Evid. 701. The fact that the lay opinion testimony bears on the ultimate issue in the case does not render the testimony inadmissible. Fed. R. Evid. 704(a); *see United States v. Rea*, 958 F.2d 1206, 1214-15 (2d Cir. 1992) ("Since neither Rule 701 nor Rule 704(a) limits the subject matter of lay opinion testimony, there is no theoretical prohibition against allowing lay witnesses to give their opinions as to [the ultimate issue in the case]."). The admissibility of Cellura's testimony therefore depends upon whether it satisfies the rational-basis and helpfulness requirements of Rule 701.

The rational-basis requirement of Rule 701 " 'is the familiar requirement of first-hand knowledge or observation.' " *Rea*, 958 F.2d at 1215 (quoting Fed. R. Evid. 701 advisory committee's note on 1972 Proposed Rules). When Lightfoot's counsel initially elicited from Cellura his opinion that age was a factor in Lightfoot's termination, the district court sustained defense counsel's objections to the unsupported opinion and told Cellura:

> You don't have any reason for saying that [age was a factor in Lightfoot's termination]. You have given us a conversation, have you? This isn't gossamer we are working with up here.
>
> What do you have that Mr. Shackelford said to support that proposition that he did or that he loved or that he ate or that he smelled?

In response to the court's admonition, Cellura described two primary factors upon which he claimed to base his opinion: the declining average age of various categories of Carbide employees and Carbide's retention of young Goebel, who was ranked similarly to Lightfoot in the forced-ranking process. Cellura had previously testified that he was one of five managers working directly under defendant Shackelford and that he was personally involved in the forced-ranking procedure that led to the termination of Lightfoot. Cellura was thus in a position to have acquired personal knowledge of the facts that formed the basis of his opinion. The district court commendably sought to ensure that Cellura's testimony focused on those objective facts.

Even when a lay opinion is rationally based upon objective facts, it may still be inadmissible if it does not help the jury to understand the witness' testimony or to decide a fact in issue. Fed. R. Evid. 701(b). This "helpfulness" requirement "is designed to provide 'assurance[ ] against the admission of opinions which would merely tell the jury what result to reach.' " *Rea*, 958 F.2d at 1215 (quoting Fed. R. Evid. 704 advisory committee's note on 1972 Proposed Rules). The challenged testimony consisted primarily of Cellura's description of the factual basis of his opinion that age was a factor in Lightfoot's termination. Cellura had established a solid

foundation of his intimate involvement with Carbide's operation and his opinion was thus based on observations about Carbide's decisionmaking process. This testimony was sufficiently helpful to be admissible.

(b) Cross-examination of Shackelford and Kraft

Defendants further contend that the trial court erred in allowing Lightfoot's counsel to cross-examine Shackelford about Carbide's earnings between 1989 and 1993, and to question Glen Kraft about emissions problems at Carbide's plants in West Virginia and Bhopal, India. Defendants regard these questions as an attempt to portray Carbide as a disreputable corporate citizen with ample financial resources to compensate victims like Lightfoot. They add that the trial judge's participation in the Bhopal questions amounted to tacit approval of that line of questioning.

As to the questions about Carbide's income and financial status, defendants never objected to this testimony. Having failed to make a timely objection at trial, defendants are limited to "plain error" review of the issue. *See* Fed. R. Evid. 103(a) (1); *Berner v. British Commonwealth Pac. Airlines*, 346 F.2d 532, 542 (2d Cir. 1965) ("[C]hallenge [to defendants' closing argument], raised for the first time on the motion for new trial, came too late.").

There was no error here, plain or otherwise, since Carbide's opening statement brought up Bhopal and made an issue of Carbide's financial straits:

> Union Carbide beginning in the mid-1980's was a company that was having serious financial problems. I'm sure most of you know about Bhopal,

> which cost the company a lot of money. There was a takeover attempt that cost the company a lot of money, and Union Carbide generally had to start reevaluating its business that resulted in the company selling off a lot of businesses that they owned; it resulted in a lot of cost cutting and it resulted in a lot of reductions in force to a lot of people.

The cross-examination of Shackelford simply explored the basis for that opening statement. During plaintiff's cross-examination of defendants' witness, Glen Kraft, the Bhopal tragedy was raised and questions were asked about poisonous emissions and their cause. The court interjected with three or four questions before concluding that the entire subject matter was "totally irrelevant in my view, but since I was interested, I asked those questions."

The court's comment that the questions were irrelevant was sufficient to alert the jury that it should not take that information into account in deciding the case. There is no error.

(c) Plaintiff's closing argument

Plaintiff's counsel, in summation, asked for a specific dollar amount as damages. Defendants now urge us to adopt a per se rule prohibiting counsel from suggesting a specific sum as damages. We decline to do so.

While at least one circuit has such a rule, *see Waldorf v. Shuta*, 896 F.2d 723, 744 (3d Cir. 1990) ("[P]laintiff's counsel may [not] request a specific dollar amount for pain and suffering in his closing remarks."), we favor a more flexible approach. It is best left to the discretion of the trial judge, who may either prohibit counsel from

mentioning specific figures or impose reasonable limitations, including cautionary jury instructions. *See Consorti v. Armstrong World Indus., Inc.*, 72 F.3d 1003, 1016 (2d Cir. 1995) (encouraging trial judges to prohibit counsel from suggesting specific monetary awards for pain and suffering), *vacated on other grounds*, 116 S. Ct. 2576 (1996); *Mileski v. Long Island R.R. Co.*, 499 F.2d 1169, 1174 (2d Cir. 1974). Here, counsel reviewed the evidence on damages and asked for an award of $1,500,000. The court instructed the jury that damages should be awarded "only upon and only in proportion to a showing as to the nature, duration and severity of his condition."

Although the jury's award of $750,000, exactly half of the demand by plaintiff's counsel, suggests that the jurors may have been influenced by counsel's mention of a particular dollar amount, in context, the closing and the charge to the jury do not support defendants' claim that the jury was *unfairly* influenced. *Cf. Consorti*, 72 F.3d at 1016 (concluding that plaintiff's counsel's suggestion of a specific amount of damages did not unfairly influence jury that awarded precise amount suggested).

(d) The mixed-motive jury instruction

Finally, defendants challenge the court's inclusion of a "mixed-motive" instruction to the jury. Age discrimination suits under the NYSHRL get the same analysis as claims under Title VII or the ADEA. *See Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1180 (2d Cir. 1992). Under Title VII, a plaintiff is entitled to a mixed-motive instruction, which shifts to the defendant the burden of showing that the plaintiff would have been fired even if there were no discriminatory motivating factor, *see Price*

Waterhouse v. Hopkins, 490 U.S. 228, 260 (1989) (White, J., concurring in the judgment), when the evidence "is sufficient to allow a trier to find both forbidden and permissible motives." *Ostrowski v. Atlantic Mut. Ins. Cos.*, 968 F.2d 171, 181 (2d Cir. 1992).

In *Ostrowski* we recognized that a plaintiff may carry his burden of proving that a forbidden factor was a motive in his termination through either direct or circumstantial evidence, *see id.* at 181-82; but a mixed-motive instruction is not required unless such evidence includes "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude." *Id.* at 182 ("[P]urely statistical evidence would not warrant [a mixed motive charge]; nor would . . . 'stray' remarks in the workplace by persons who are not involved in the pertinent decisionmaking process.").

The district court properly found that Lightfoot produced sufficient evidence to earn a mixed-motive instruction. Lightfoot testified, for example, that Shackelford expressed surprise and disbelief when Lightfoot said he wanted to work until he was seventy years old. In addition to his opinion that age was a factor in Lightfoot's termination, Dr. Cellura testified that Carbide "has a high potential category where they take particular interest in young talented people." While the quantum of Lightfoot's evidence may have been less than that in *Ostrowski*, it was nevertheless adequate to support the instruction given by the court.

C. Attorney's Fees

While Lightfoot's only claim that survived summary judgment and went to trial was a state claim under the

NYSHRL, Lightfoot asserts that he is entitled to an award of attorney's fees as a prevailing plaintiff under the ADEA. The elements of an age discrimination claim are essentially the same under the ADEA and the NYSHRL, although the relief available under the two statutes is not identical. A prevailing party in an action brought under the ADEA is entitled to recover attorney's fees, *see Hagelthorn v. Kennecott Corp.*, 710 F.2d 76, 86 (2d Cir. 1983), but the NYSHRL does not provide for an award of fees, *see New York City Bd. of Educ. v. Sears*, 443 N.Y.S.2d 23, 25 (App. Div. 1981).

Lightfoot first argues that the ADEA claim was either never actually dismissed or was improperly dismissed. As discussed above, *see supra* Part A.5., this argument is without merit.

Lightfoot next contends that even if his ADEA claim was properly dismissed, he is entitled to attorney's fees under *Dominic v. Consolidated Edison Co.*, 652 F. Supp. 815 (S.D.N.Y. 1986), *aff'd*, 822 F.2d 1249 (2d Cir. 1987) and *Milwe v. Cavuoto*, 653 F.2d 80 (2d Cir. 1981). *Dominic* is clearly inapposite. Defendants in that case contested the size of the fee award requested by plaintiff's counsel after plaintiff actually prevailed in an action under the ADEA. Defendants argued that plaintiff was not entitled to recover fees for all of the time spent on the case because he had prevailed on only one of five claims originally included in his complaint. The court held that because all five claims alleged age discrimination, and the legal theories involved in all five were "inextricably intertwined," no reduction in the fee award was required. Lightfoot maintains that his claims under the ADEA and NYSHRL were similarly "intertwined," and that he is therefore entitled to recover fees for both

claims under *Dominic*. We disagree. *Dominic* addresses not whether a plaintiff is entitled to attorney's fees, but how much he may recover once he has established that he *is* entitled to recover them.

Lightfoot's invocation of *Milwe* is similarly misplaced. In *Milwe* the plaintiff sued various law-enforcement officials under 42 U.S.C. § 1983 and state tort law. Her complaint alleged that one officer had knocked her to the ground and broken her nose while the others watched, and that several others had violated her constitutional rights by filing a false affidavit to procure her arrest several days after the original incident. A jury found one officer liable for the assault under both § 1983 and state tort law and awarded damages of $1 and $1,320 respectively on those claims. The jury also found for plaintiff on her remaining constitutional claim and state-law claim for false arrest. The district court denied plaintiff's motion for attorney's fees, and the plaintiff appealed.

On appeal the defendants in *Milwe* argued that a fee award would be inappropriate because the jury had awarded substantial damages only on the pendent state-law assault claim, and not on the constitutional claim arising from the same incident. We rejected this argument, holding that "attorney's fees are available in cases in which the plaintiff prevails on a wholly statutory, non-civil rights claim pendent to a substantial constitutional claim." *Milwe*, 653 F.2d at 84. The *Milwe* panel reasoned that such a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional rights without undermining the longstanding judicial policy of avoiding unnecessary constitutional decisions." *Id.* (quotations omitted). Lightfoot contends that *Milwe* estab-

lished a "substantiality test" under which a plaintiff is entitled to attorney's fees when he prevails on a state-law claim arising out of a common nucleus of operative fact with a federal claim pursuant to which attorney's fees would be available. We decline to adopt so broad an interpretation of *Milwe*.

The holding in *Milwe* was expressly limited to plaintiffs who prevail on a statutory claim *pendent* to a substantial constitutional claim. Lightfoot's claim under the ADEA was properly dismissed prior to trial, and his action under the NYSHRL was therefore no longer pendent to anything federal when he prevailed at trial. In addition, the underlying rationale of *Milwe* was based largely on the policy concern of avoiding unnecessary constitutional decisions—a policy not implicated where the asserted basis for a fee award is merely a federal statute such as the ADEA. Finally, we see no reason to reward those plaintiffs who supplement their valid claims under the NYSHRL with meritless claims under the ADEA by allowing them to circumvent the state-law rule that attorney's fees are not available under the NYSHRL. Lightfoot is thus not entitled to an award of attorney's fees as a prevailing plaintiff on this basis.

D. Remittitur of the Damages Award

After a full trial on liability and damages, the jury returned a verdict for Lightfoot and awarded him $750,000 in compensatory damages under the NYSHRL. Defendants moved for a remittitur of the damages award, or, in the alternative, a partial new trial on damages. The district court granted defendants' motion for remittitur, outrightly reducing the jury's award to $75,000. Lightfoot argues that because determination of an award of

damages lies within the province of the jury, a court's outright reduction of a jury's award without offering the plaintiff the option of a new trial on damages denies the plaintiff his constitutional right to a jury trial. Plaintiff is right.

Where a jury has awarded damages in an amount considered excessive by the trial court, "[i]t is not among the powers of the . . . court . . . simply to reduce the damages without offering the prevailing party the option of a new trial." *Tingley Sys., Inc. v. Norse Sys., Inc.*, 49 F.3d 93, 96 (2d Cir. 1995) (reviewing court's grant of remittitur of damages awarded under Connecticut Unfair Trade Practices Act); *Phelan v. Local 305 of the United Ass'n of Journeymen and Apprentices of the Plumbing & Pipefitting Indus.*, 973 F.2d 1050, 1064 (2d Cir. 1992). This rule derives from the trial-by-jury protections of the Seventh Amendment. *Cf. Kennon v. Gilmer*, 131 U.S. 22, 29 (1889). A trial court may, however, condition denial of a defendant's motion for a new trial on the plaintiff's stipulation to a remittitur in a stated amount. *See Tingley*, 49 F.3d at 96; 11 Wright, Miller & Kane, *Federal Practice and Procedure* § 2815 (1995).

Accordingly, the district court erred in granting defendants' motion for a remittitur without offering Lightfoot the option of a new trial on damages. We must remand to allow Lightfoot the opportunity to exercise this option. The Supreme Court's recent decision in *Gasperini v. Center for Humanities*, 116 S. Ct. 2211, 2218 (1996) sets forth the applicable standards to determine excessiveness and the appropriateness of remittitur under New York law.

CONCLUSION

This matter is remanded to the district court for reconsideration of the court's grant of a remittitur of damages. We have considered all of the remaining claims raised by plaintiff and defendants and, finding them to be without merit, we affirm in other respects the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)
Filed July 24, 1995

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

CIVIL JUDGMENT

A Jury Trial before the Honorable Harold Baer, Jr., U.S.D.J. having begun on June 23, 1995, and at the conclusion of the trial the jury having returned a verdict in favor of plaintiff in the sum of $750,000.00, it is

ORDERED, ADJUDGED AND DECREED: That the plaintiff have judgment in the sum of $750,000.00 as against the defendants.

SO ORDERED

/s/ HAROLD BAER, JR.
U.S.D.J.

Dated: New York, New York
July 11, 1995

JAMES M. PARKISON
Clerk

BY: /s/ JOHN S. HAGEN
Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—v.—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION, and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

Before:

HON. HAROLD BAER, JR.,

District Judge

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiff
ARTHUR M. WISEHART
MICHAEL H. PRINCE

MCDERMOTT, WILL & EMERY
Attorneys for Defendants
JOEL E. COHEN
NANCY I. SOLOMON

(In open court, jury present)
(3:00 P.M.)

THE COURT: Sorry to keep you for the period of time that you had in the jury room following your note to me, which I have marked as Court Exhibit 10A which reads, "We have reached a verdict," but we were in the midst of summations in another case. So it was hard to do anything about it until it was over. But we now have you and your note, and my clerk will take the verdict.

THE CLERK: Would the foreperson please rise.

Has the jury agreed upon a verdict?

THE FOREPERSON: Yes, we have.

THE CLERK: To question 1, was age discrimination a motivating factor in the defendants' decision to terminate the plaintiff?

THE FOREPERSON: Answer yes.

THE CLERK: To question 2, would the defendants have made the same decision to terminate plaintiff even if it had not taken the plaintiff's age into account?

THE FOREPERSON: Answer no.

THE CLERK: To question 3, specify the amount of compensatory damages to be awarded to the plaintiff.

THE FOREPERSON: Amount $750,000.

THE COURT: Well, thank you, ladies and gentlemen.

Do either of you want the jury polled? Hearing nothing, I will simply thank you for your efforts and indeed tell you that I think this system, and I am sure you share the view, really can't work without people like yourselves.

I'm sure counsel join me in thanking you for the time that you took out of your busy lives to be with us, think about this case pretty exclusively for a few days and then deliberate and come to a verdict, and you are discharged.

(Jury dismissed)

THE COURT: If there are any motions, I would ask that they be made on papers and in accordance with the rules of Federal Rules of Civil Procedure, and I thank you all for being here.

MR. WISEHART: Thank you, your Honor.

(Trial concluded)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORP., et al.,

Defendants.

OPINION AND ORDER

HAROLD BAER, JR., District Judge:

Plaintiff Richard Lightfoot moves for an Order of recusal, pursuant to 28 U.S.C. § 455. For the reasons discussed below, the motion is DENIED.

BACKGROUND

Plaintiff brought this action alleging discriminatory termination by his employer and his supervisors. Following a jury trial, the jury found for plaintiff and awarded him $750,000 in damages. I remitted the damages to $75,000 and both parties appealed. The Second Circuit affirmed in part, vacated in part and vacated to this Court for further proceedings. *Lightfoot v. Union Carbide Corp.*, 110 F.3d 898

(2d Cir. 1997). Specifically, the Circuit held that my remittitur order was improper in that it did not afford plaintiff the option of a new trial on damages. *Id.* at 914-15.

Following the remand, the parties were called in for a pretrial conference on May 9, 1997. No court reporter was present. At the conference, I urged the parties to settle the matter. When defendant indicated it would be unwilling to settle for much more than $75,000 plus litigation costs, plaintiff indicated this was insufficient. In response to this comment of plaintiff's, I suggested that plaintiff should bear in mind my prior remittitur in assessing the wisdom of trying the case again. I noted my view that, based on the evidence presented at the first trial, plaintiff did not suffer more than $75,000 in damages. This motion followed.

DISCUSSION

The applicable standards regarding recusal require that "[a]ny justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). Furthermore, a judge "shall also disqualify himself . . . [w]here he has a *personal* bias or prejudice concerning a party, or *personal* knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1) (emphasis added). Plaintiff is correct in pointing out that the standard set forth in Section 455 does not require actual bias but merely the reasonable appearance of bias, *see United States v Helmsley*, 760 F. Supp. 338, 341 (S.D.N.Y. 1991), *aff'd*, 963 F.2d 1322 (2d Cir. 1992), and constitutes a significant change in recusal law, *see United States v. Pepper & Potter, Inc.*, 677 F. Supp. 123, 125 (E.D.N.Y. 1988). Nevertheless, recusal is inappropriate here.

Courts have long recognized that "[a] judge is as much obliged not to recuse himself when it is not called for as he is obliged to when it is." *In Re Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1312 (2d Cir. 1988). Furthermore, dissatis-

faction with a legal ruling—such as my decision to grant a remittitur—is an insufficient basis for recusal, for it would in effect allow "judge shopping" by plaintiffs. As the Second Circuit has recognized, "the trial judge must carefully weigh the policy of promoting public confidence in the judiciary against the possibility that those questioning his impartiality might be seeking to avoid the adverse consequences of his presiding over their case." *Id.*

Principally, plaintiff argues that my comments at the pre-trial conference[1] to the effect that plaintiff should keep in mind my view of the evidence constitute an expression of bias necessitating recusal. Even under the more relaxed requirements of Section 455, recusal here would be inappropriate. My comments; merely reiterated my view (as expressed in the remittitur order) that, based on the evidence presented at plaintiff's first trial, the damages were insufficient to sustain a $750,000 verdict (or any verdict in excess of $75,000). Such comments do not require recusal for two reasons.

First, "opinions formed by the judge on the basis of facts introduced . . . in the course of the current proceedings, *or of prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994) (emphasis added). Thus, "it is clear that the following types of evidence will not support a recusal motion: judicial rulings based on evidence presented at trial; [or] the court's observation regarding the legal sufficiency of evidence presented at trial." *Bin-Wahad v. Coughlin*, 853 F. Supp. 680, 686 (S.D.N.Y. 1994) (citations omitted). As my comments at the pre-trial conference were based on my assessment of the damages evidence presented at trial, they do not support a recusal motion.

Second, it is likely that plaintiff's damages evidence at any, retrial will differ from the evidence offered at the first trial. This is almost inevitable, even if the same witnesses are

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[1] It should be noted that these comments were made in an attempt to encourage the parties to settle the case.

called. While I believe the evidence presented at the first trial did not establish damages of $750,000, such a conclusion does not foreclose the possibility that the damages presented at a retrial will in fact support a jury verdict in excess of $75,000. Such an assessment simply cannot be made at this time and my comments were not intended to convey any prejudgment as to the sufficiency of the evidence plaintiff may present at the retrial. Furthermore, I do not believe that a reasonable person would construe my comments as indicating any such prejudgment on my part.

Finally, plaintiff points to my reference to plaintiffs appellate brief as a lot of "silliness" or "nonsense" as further proof of my impartiality. Such a contention also fails. First, as defendants point out, I referred to both parties' briefs as a lot of silliness and apparently my view was vindicated (albeit in more decorous language) by the Court of Appeals, which rejected the vast majority of both parties' assignments of error. Second, my views regarding plaintiff's counsel's legal strategy—whatever they may be—do not constitute grounds for recusal. "[C]ourts have drawn a sharp distinction between alleged hostility between judge and party and alleged hostility between judge and attorney. Except in extreme and rare cases. the appearance of hostility on the part of the judge *toward an attorney* has been ruled an insufficient basis for recusal." *Helmsley*, 760 F. Supp at 342 (citation omitted). Certainly, my comments with respect to the merit of plaintiff s appellate brief reflect only my views of his attorney, if anything, and not my views of plaintiff himself.[2] Accordingly, such comments do act support recusal.

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[2] While on the subject of plaintiff's attorney's conduct, the Court notes that plaintiffs counsel, Arthur Wisehart, has a peculiar habit of filing recusal motions. Not only has he previously filed a recusal motion in this case (which was denied), but defendants identify at least four other cases in which he has filed such motions, often based on evidentiary or other rules of the judge in question. On at least one occasion, the judge in question chastised Mr. Wisehart and noted that "[t]he material that Mr. Wisehart has provided on the recusal subject is so scurrilous and so baseless and so ridiculous that I cannot even begin to be fair to any parties in this case after reading this." *Lipin v. American Nat'l Red Cross*, No. 1997

CONCLUSION

For the reasons discussed above, Plaintiff's motion is DENIED. The case is added to the January 1998 trailing trial calendar. The parties are instructed to exchange expert reports, if any, on or before December 1, 1997.

SO ORDERED

Dated: August 28, 1998
New York, New York

/s/ HAROLD BAER, JR.
U.S.D.J.

WL 279912 (2d Cir. May 22, 1997) at *5 n.1 (quoting New York State Supreme Court Justice Moskowitz). While the same is not true of the instant recusal motion, Mr. Wisehart's practice calls into question either his good faith and adherence to Rule 11 in filing such motions or his grasp of the applicable legal issues. Recusal is a drastic remedy, not to be taken lightly. Mr. Wisehart's practice of filing recusal motions when he disagrees with a judge's rulings undermines the gravity with which such motions should be created and impugns judicial integrity by implying rampant judicial bias. I urge Mr. Wisehart take seriously my and other judge's admonitions in this regard. That said, I emphasize that my decision here is based on the law, as discussed above, not on my views as to Mr. Wisehart's probity or wisdom and not on my predilections about whether or not I would choose to retry this case if I had the choice.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

APPEARANCES

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ORDER AND OPINION

HAROLD BAER, JR., United States District Judge.

Plaintiff Richard Lightfoot commenced this action against his former employer, Union Carbide, and Union Carbide executives A.W. Lutz and W.E. Shackelford (collectively, the "defendants") alleging, *inter alia*, wrongful termination based on age discrimination under the Age Discrimination in Employment Act of 1967, *as amended*, 29 U.S.C. § 621 *et seq.* ("ADEA"), and under the New York State Executive Law 5 296 (McKinney 1993) ("NYSHRL"). After trial, the jury found in favor of Lightfoot and awarded him $750,000 in compensatory damages under the NYSHRL.

Lightfoot now moves for attorney's fees under section 626(b) of ADEA. The defendants move for a new trial, pursuant to Rule 59(a) of the Federal Rules of Civil Procedure, and in the alternative, for a new trial on the issue of damages, or for a remittitur.

For the reasons that follow, Lightfoot's motion for attorneys' fees is denied; the defendants' motion for a new trial is denied; the defendants' motion for a new trial on the issue of damages is denied; and the defendants' motion for remittitur is granted in accordance with this opinion.

I. Background

Traced to its origins, Lightfoot's suit alleged a panoply of claims against the defendants including breach of contract, quantum meruit, unjust enrichment, tortious interference with contract, as well as age discrimination under ADEA and the NYSHRL. Judge Patterson dismissed all of Lightfoot's claims except for those brought under ADEA and the NYSHRL. *See* Order and Opinion, 92 Civ. 6411 (RPP), May 12, 1994. Regarding Lightfoot's discrimination claims, Judge Patterson held that

> Defendants' motion for Summary judgment on plaintiff's ADEA and New York State Human Rights claims is denied . . . Although plaintiff may pursue his federal and New York State age discrimination claims he cannot recover damages for lost wages because he continued to receive full pay as a severance benefit after he was offered his job back. Summary Judgment is granted in the defendants' favor in all causes of actions as to Carbide's liability for backpay.

Id. at 8-12. In a subsequent opinion, Judge Patterson further ruled that Lightfoot was not entitled to damages for front pay. *See* Order and Opinion, 92 Civ. 6411 (RPP), July 28, 1993, at p. 3.

Because Judge Patterson's rulings stripped Lightfoot of any compensable damages under ADEA, I dismissed that claim, over the objection of the plaintiff. *See* Trial Tr. at pp. 2- 5. Accordingly, the only claim Lightfoot presented to the jury was age discrimination under the NYSHRL. It was that claim on which the jury an June 29, 1995 awarded Lightfoot $750,000 in compensatory damages.

II. Discussion

A. *Lightfoot's Motion For Attorneys' Fees and Post-judgment Interest*

1. *Attorneys' Fees*

Lightfoot argues that in his view, the ADEA claim was never dismissed and he is entitled to attorneys, fees as a prevailing party under that statute. 28 U.S.C. § 626(b).[1] Although Lightfoot correctly notes that Judge Patterson did not dismiss his ADEA claim, he overlooks the fact that I did. *See* Trial Tr. at pp. 2-5.

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[1] Because attorneys' fees are not recoverable under the NYSHRL, Lightfoot is entitled to attorneys' fees only if his ADEA claim was alive and well at the trial.

Lightfoot's more substantial argument, although equally unavailing, is that I improperly dismissed his ADEA claim. Because Judge Patterson's prior rulings effectively deprived Lightfoot of any relief under ADEA, *see supra*, pp. 2-3, I dismissed that claim just before the commencement of trial. *See supra*, p. 3. In *McLaughlin v. State of New York, Governor's Office of Employee Relations*, 784 F. Supp. 961 (N.D.N.Y. 1992), a case that addresses the status of a Title VII claim without a remedy, the plaintiff sued her employer for sexual harassment under Title VII. The employer moved for summary judgment, arguing that because the plaintiff was not fired or demoted, which might have entitled her to backpay, she had no viable remedy and her claims should be dismissed. In agreeing with the employer's reasoning, the court stated that "[t]he 'case or controversy' requirement of Article III of the United States Constitution dictates that a plaintiff cannot maintain a suit in which no relief can be granted." *Id.*, at 973 (citation omitted) The court further held that

> a threshold to recovery of attorneys' fees is that the plaintiff must prevail *in the underlying Title VII action*. If a plaintiff does not prevail in the underlying action, then she cannot recover attorney's fees under Title VII.
>
> The effect of the "prevailing party" rule is that plaintiff cannot rely upon the possible availability of attorney's fees as a remedy that would allow her to withstand defendants motion for summary judgment. A suit *cannot be maintained for the sole purpose of recovering attorney's fees*.

Id. at 980 (emphasis added) (citations omitted).

Similarly, in another case where no viable remedy was available to a Title VII plaintiff, the Seventh Circuit dismissed the plaintiff's complaint for failure to state a claim. *Hale v. Marsh*, 808 F.2d 616 (7th Cir. 1986). The court held that "[a] Title VII suit [cannot] be maintained for the sole purpose of obtaining an attorney's fee for the plaintiff's lawyer." *Id.* at 620 (citation omitted).

Lightfoot further claims that, notwithstanding *McLaughlin* and *Hale*, attorneys' fees are nevertheless appropriate in instances where a plaintiff prevails on a state claim pendent to an unsuccessful civil rights claim. *Milwe v. Cavuoto*, 653 F.2d 80, 84 (2d. Cir. 1981). He argues that this action presents just the circumstances that the Milwe court contemplated. I disagree. The *Milwe* court limited its holding to situations where " 'the plaintiff prevails on a wholly statutory, non-civil rights claims *pendent to a substantial constitutional claim*. . . .' " *Id.* (emphasis added) (quoting *Maher v. Gagne*, 448 U.S. 122 (1980). As I dismissed Lightfoot's ADEA claim before the commencement of trial, he lacked the requisite "substantial constitutional claim."

2. *Post-judgment Interest*

Lightfoot seeks to recover post-judgment interest from the date the verdict was rendered to the date of entry of judgment, pursuant to C.P.L.R. § 5002 (McKinney 1992), and from the date of entry of judgment forward, pursuant to 28 U.S.C. § 1961(a) and C.P.L.R. § 5003 (McKinney 1992).

Federal courts agree that post-judgment interest on a money judgment recovered in federal court is governed by 28 U.S.C. § 1961(a). *See, e.g., Fuchs v. Lifetime Doors, Inc.*, 939 F.2d 1275, 1280 (5th Cir. 1991); *Travelers Ins. Co. v. Transport Ins. Co.*, 846 F.2d 1048, 1053-54 (7th Cir. 1988); *Goldman v. Burch*, 778 F. Supp. 781 790 (S.D.N.Y. 1991).

The language of Section 1961(a) seems clear: "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court. . . . *Such interest shall be calculated from the date of the entry of the judgment*. . . . 28 U.S.C. § 1961(a) (emphasis added). Accordingly, Lightfoot is entitled to post-judgment interest from the date judgment was entered.

B. *Union Carbide's Motions*

The defendants move for a new trial on the grounds that the jury's verdict is contrary to the weight of the evidence; the

admission of improper evidence and prejudicial comments made by Lightfoot's attorney, Arthur Wisehart, tainted the jury; and the jury's award is excessive and unreasonable. In the alternative, the defendants argue that they are entitled to a new-trial an the issue of damages, or to a remittitur.

1. *Motion For a New Trial*

a. *Jury verdicts that are contrary to the weight of the evidence*

A motion for a new trial may be granted when the district court feels that " 'the jury has reached a seriously erroneous result or . . . the verdict is a miscarriage of justice . . . .' " *Song v. Ives Laboratories, Inc*, 957 F.2d 1041, 1047 (2d Cir. 1992) (citations omitted). In this case, although in my view the evidence presented by the plaintiff on his claim was at best equivocal. I cannot characterize the result as "seriously erroneous."

b. *Evidence that is improperly admitted*

Where evidence that prejudices the rights of a party has been improperly admitted, a court may order a new trial. *See, e.g., Logan v. Dayton Hudson Corp.*, 865 F.2d 789 (6th Cir. 1989). Here, the defendants argue that the jury was tainted by testimony that I erroneously admitted and by improper comments made by Mr. Wisehart in the jury's presence. Even accepting the defendants position regarding the admissibility of the evidence at issue and the propriety of Mr. Wisehart's comments, they do not amount to prejudice so extreme as to warrant a new trial.

2. *Defendants' Motion For a New Trial on Damages or a Remittitur*

The defendants' arguments in favor of a new trial on the issue of damages is unnecessary in light of the law with respect to excessive verdicts and remittitures. Based on the law, a remittitur is appropriate. Looking at New York law, the

standard spelled out in CPLR § 5501(c) is pretty well established as applicable to trial and appellate courts and reads in pertinent part that "an award is excessive if it deviates materially from what would be reasonable compensation." *See Prunty v. YMCA of Lockport Inc.*, 206 A.D.2d 911, 616 N.Y.S.2d 117 (4th Dep't 1994). In analyzing the issue in *Prunty*, the Fourth Department wrote "at least two of the Departments of the Appellate Division have ruled that the trial court may overturn a jury's award of damages in a negligence action where it deviates materially from what would be reasonable compensation . . . . We now adopt the same rule." *Prunty*, 206 A.D.2d at 911, 616 N.Y.S.2d at 118.

At least one Federal District Court has reached the same conclusion. *See Travellers Companies v. New York General Mechanical Inc.*, 1994 WL 584926 (W.D.N.Y. Oct. 24, 1994). The issue then is how to determine excessiveness. In a recent decision, Judge Leval concludes that the court must take into consideration verdicts in similar cases as one way to determine whether there is a material deviation:

> [i]n the face of so substantial a pattern of New York judgments communicating that New York courts find excessiveness in such cases at far lower levels, we believe it was error for the district court to conclude that the jury's $12 million award was within the range accepted by New York law.

Consorti v. Armstrong World Industries, 64 Fed.3d 781, ___ (2nd Cir. 1995). After a review of New York State Human Rights law verdicts dealing with age discrimination and other wrongdoing covered by the law, there seems little doubt that the verdict here was a material deviation from the norm. A number of New York courts have remitted damage awards in discrimination cases. *See, e.g., Quality Care, Inc. v. Rosa*, 599 N.Y.S.2d 65, 66 (2d Dep't 1993) ($10,000 award for compensatory damages in age discrimination case remitted to $5,000); *Pioneer Grour v. State Division of Human Rights*, 572 N.Y.S.2d 207, 208 (4th Dep't 1991) ($10,000 award for compensatory damages awarded to plaintiff who was unlaw-

fully discriminated against on basis of conviction of a crime remitted to $5,000); *Cosmos Forms, Ltd. v. State Division of Human Rights*, 541 N.Y.S.2d 50, 51 (2d Dep't 1989) ($35,000 award for compensatory damages for racial discrimination remitted to $5,000).

Similarly, the First Circuit, sitting in review of a Puerto Rican District Court's reduction of plaintiff's jury award for the pain and suffering incurred as a result of job loss from $150,000 to $37,500 found that the reduction was not unjustified. *See Sanchez v. Puerto Rico Oil Co.*, 37 F.3d 712, 724 (1st Cir. 1994).

In another recent Federal case, *Binder v. Long Island Lighting Company*, 847 F. Supp 1007 (E.D.N.Y. 1994), a $497,738 verdict for pain and suffering was reduced to $5,000. In an even more recent Title VII lawsuit, Judge Chin upheld an award on a far more unfortunate fact pattern than in the case at bar, that included $100,000 for pain and suffering. *Marfia v. Ozman*, 1995 WL 584677, *7 (S.D.N.Y. Sept. 15, 1995). In that case, the plaintiff was so distressed by his wrongful termination that he attempted suicide and was fortuitously stopped by his fifteen year old son. The plaintiff was then taken to a hospital where he was placed on suicide watch for two weeks. Nothing as compelling came to light here.

In the instant action, Lightfoot's compensatory damage verdict wax a material deviation not only from similar cases but also from the proof adduced at trial. Taken together with Judge Leval's decision in *Consorti*, the verdict must be reduced.

Plaintiff's damages are remitted from $750,000 to $75,000.

III. Conclusion

For the reasons set forth above, Lightfoot's motion for attorneys' fees is denied; the defendants' motion for a new trial is denied; the defendants' motion for a new trial on the issue of damages is denied; and the defendants' motion to

remit damages is granted in accordance with this Order and Opinion.

SO ORDERED.

New York, New York
Dated: October 24, 1995

/s/ HAROLD BAER, JR.
Harold Baer, Jr.
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

Before:

HON. HAROLD BAER, JR.,

District Judge.

APPEARANCES

WISEHART & KOCH
Attorneys for Plaintiff
ARTHUR M. WISEHART
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MCDERMOTT, WILL & EMERY
Attorneys for Defendants
JOEL E. COHEN
NANCY I. SOLOMON

* * *

I don't expect that this case is going to produce any media attention, certainly not in the immediate future, but once again, the role of jurors is simply to assess the evidence, and the evidence is what you hear here, both testimony and exhibits and any stipulations that may be entered into-between the parties and that's it.

So if there is anything in the newspaper or on the radio or television, just put it down and turn it off, depending on what it is.

See you on Friday morning at 9:30. Please be prompt so that we can start on time. Have a good evening and a good day, and we will see you Friday.

(Jury excused)

THE COURT: While I have a court reporter, maybe it's a good time to read into the record what we had been talking about before we started.

I think this resolves all the questions that we have in front of us.

Defendants Union Carbide Corporation, A.W. Lutz and W.E. Shackelford, collectively the defendants, moved in limine to exclude the admission into evidence of certain testimony and exhibits that plaintiff, Richard Hall Lightfoot intends to offer into evidence at trial.

Similarly, Lightfoot moved in limine to exclude certain exhibits that defendants intended to offer.

The court ruled on these motions in its memorandum order, dated May 31, 1995, but reserved decision on the admissibility of evidence relating to pretermination damages and requested the parties to submit letter briefs addressing this issue.

The court further requested an explanation of the relevance of Plaintiff's Exhibits 29, 30 and 110 beyond their application to pretermination damages.

Additionally, the defendant requested of the Court by letter, dated June 7, 1995, to preclude Lightfoot from one, allowing Andrew Gluck to testify as to loss of earnings; and two, admitting plaintiff's special interrogatories at trial. I guess those really are what I mean as the verdict sheet.

After reviewing the parties letter briefs as well as the prior rulings of Judge Patterson, the Court in an effort to clarify and/or maybe better said restate its May 31 ruling, initially notes that Mr. Lightfoot is not entitled to damages for back pay order, an opinion dated May 12, '94 by Judge Patterson at page 12 reads in pertinent part as follows:

Summary judgment is granted in the defendant's favor in all causes of action as to Carbide's liability for back pay. Nor are they entitled to damages for front pay."

Again, Judge Patterson's opinion of July 28th, '94 at page 3, which reads in part, "Plaintiff waived his right to front pay when he declined Carbide's offer of reinstatement."

The Court, in consequence, concludes:

One, Lightfoot's pretermination discrimination damages claim is time-barred.

Lightfoot alleges that when he was promoted to business director in '88, he remained at grade 17 while Robert Kisker, already a business director at the time, was at grade 19. Consequently, any purported pay disparity claim arising from Lightfoot's grade 17 status after his '88 promotion conclude in '88.

Thus, because Lightfoot filed its EEOC charge and complaint in 1992, this claim is untimely, see 29 U.S.C., Section 626(d) (Claim for age discrimination is untimely if plaintiff files a charge with the EEOC more than 300 days after the alleged unlawful conduct occurred.) Murphy versus American Home Products Corp., 461 N.Y.S. 2d 232, 239. Three years statute of limitations for age discrimination claims is applicable. The Court acts under the New York State Human Rights Law.

I should note parenthetically in the robing room we discussed looking at this one more time, and we will.

Two, defendant's motion to preclude Lightfoot from offering into evidence is it Plaintiff's Exhibit's 29 and 30, documents prepared by Lightfoot containing salary comparisons, and Plaintiff's Exhibit 110 a document prepared by Lightfoot comparing his salary to Robert Kisker is denied.

Three, the court reserves decision on defendant's request to preclude Lightfoot from calling Andrew Gluck to testify.

With respect to plaintiff's verdict sheet, basically I reserve decision on that issue, because I heard nothing from the plaintiff, and I wondered whether there was anything that the plaintiff had to say in response.

If you do, I will be glad to listen. Yes

MR. WISEHART: Your Honor, I believe that has to do with compensatory damages, and the claim for compensatory damages is clarified in a letter that we sent to the Court today. It includes his claim for his personal injury, mental anguish and damage to reputation.

* * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (RPP)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

OPINION AND ORDER

ROBERT P. PATTERSON JR., U.S.D.J.

Plaintiff moves pursuant to Rules 52(b) 59(e), 60 (b)(2) and 60(b)(6) of the Federal Rules of Civil Procedure to amend and modify this Court's Orders dated May 12, 1994 and July 28, 1994 by: (1) Vacating the grant of summary judgment and the dismissal of Count V of Plaintiff's Amended Complaint based on the Plaintiff's assignment of invention rights; and (2) Vacating the Court's decision that Plaintiff's damages for backpay are precluded by his failure to accept an unconditional offer of reinstatement.

Plaintiff argues that "newly discovered evidence" supports vacating the Court's previous dismissal of Count V of the

Amended Complaint (a claim of unjust enrichment based on the alleged expiration of his assignment of invention rights). Lightfoot Aff. dated August 11, 1994 ("Lightfoot Aff.") at ¶¶ 3-16. Plaintiff contends that because Defendant Union Carbide Corporation ("Carbide") executed a different agreement with another employee regarding the assignment of invention rights, material issues of fact are raised which are properly determined by the jury.[1] Lightfoot Aff. at ¶ 16. However, the execution by Carbide of a different agreement with another employee does not create any ambiguity in Plaintiff's agreement because, under New York law, "[i]f a contract is unambiguous, courts are required to give effect to the contract as written and may not consider extrinsic evidence to alter or interpret its meaning." *Consarc Corp. v. Marine Midland Bank, N.A.*, 996 F-2d 568, 573 (2d Cir. 1993) (citations omitted). Since the Plaintiff's assignment of invention rights to Carbide is not ambiguous, this "new evidence" provides no ground for vacating the dismissal of Count V of the Amended Complaint.

The other basis Plaintiff offers for amending the Court's previous orders consists of Judge McKenna's decision in *Ladson v. Ulltra as Parking Corp.*, 853 F. Supp. 699 (S.D.N.Y. May 10, 1994). Lightfoot Aff. at ¶ 17. Judge McKenna noted in Ladson that "[i]t is for the trier of fact to determine the unconditionally of an offer and the reasonableness of a refusal." 853 F. Supp. at 705 (citing *Pierce v. F.R. Tripler Co.*, 955 F.2d 820 [2d Cir. 19921). In *Ladson* Judge McKenna ruled that "special circumstances" existed which prevented the tolling of backpay liability based on undisputed threats of physical violence toward the plaintiff and a finding that the defendants did not offer plaintiff the job previously denied as

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[1] James B. White, Plaintiff's former supervisor, executed an agreement with Carbide in 1991 which stated that his assignment obligations "shall survive termination of [his] employment for any reason." Lightfoot Aff. Ex. A. Lightfoot's agreement with Carbide contained no such provision. *Id.* at Ex. B. 2.

required by *Ford Motor Co. v. EEOC*, 458 U.S. 219 (1982). 853 F. Supp. at 705-06.

This Court also cited *Pierce* on page 2 of its July 28, 1994 Opinion and Order for the holding that "an unconditional offer of a job substantially similar to the one denied the plaintiff, may, as a matter of law, toll back pay. . . ." 955 F.2d at 830. No "special circumstances" exist in the instant case which would preclude the tolling of backpay liability, and therefore Judge McKenna's decision *Ladson* presents no basis for amending the Court's previous orders.[2]

For the reasons described above, Plaintiff's motion is denied in its entirety. As previously ordered, the parties will prepare and file a pretrial order by February 7, 1994, and be ready for trial on February 14, 1994.

IT IS SO ORDERED.

Dated: New York, New York
January 23, 1995

/s/ ROBERT P. PATTERSON, JR.
ROBERT P. PATTERSON, JR.
U.S.D.J.

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[2] Plaintiff contends that a psychiatric evaluation by Dr. Stanley L. Portnow dated August 20, 1992 (the "Portnow Evaluation") establishes that his rejection of reinstatement was reasonable because of changed staffing patterns in the department where he was offered reinstatement. Lightfoot Aff. at ¶¶ 18-27 and Ex. C. The Portnow Evaluation, in the possession of Plaintiff's counsel for almost two years prior to the Court's Order and Opinion of July 28, 1994, provides no support for revisiting the Court's decision that Plaintiff's damages for backpay are precluded because of his failure to accept an unconditional offer of reinstatement.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (RPP)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICAL DIVISION

Defendants.

ORDER AND OPINION

ROBERT P. PATTERSON, JR., U.S.D.J.

This is a motion made pursuant to local rule 3(j) by plaintiff Richard Lightfoot for reargument of the Order and Opinion dated May 12, 1994 granting Defendants, Union Carbide, A.W. Lutz and W.E. Shackelford partial summary judgment. This motion is denied because plaintiff has raised no new factual issues or controlling legal decisions which had been overlooked by the Court in its May 12, 1994 Order and Opinion.

I. SEVERANCE PAY

Plaintiff argues that the Court improperly decided that plaintiff's backpay must be reduced by the amount that he received as severance. Such a deduction is improper according to plaintiff because severance pay is a fringe benefit earned before termination that cannot properly be considered when determining the amount of backpay that plaintiff is entitled. However, plaintiff fails to cite to any controlling authority that this Court overlooked. *James v. Fleet/Norstar Financial Group*, 992 F.2d 463 (2d Cir. 1993), cited by plaintiff, concerns whether severance pay can be considered an ERISA benefit and is not applicable to this case. Moreover, courts have routinely reduced backpay awards by the amount a former employee received in severance. *See Munnelly v. Memorial Sloan Kettering Cancer Center*, 741 F. Supp. 60 (S.D.N.Y. 1990); *Sinclair v. Insurance Co. of North America*, 609 F. Supp. 397 (E.D. Pa. 1984), *aff'd* 782 F.2d 1029 (3d Cir. 1986); *see also Sims v. Madame Paulette Dry Cleaners*, 633 F. Supp. 224 (S.D.N.Y. 1986) (offset damages by plaintiff's unemployment benefits); *Meschino v. International Tel. & Tel. Corp.*, 661 F. Supp 254 (S.D.N.Y. 1987) (discriminatory employer allowed to deduct pension benefits received by plaintiff from ADEA award). Thus reargument, on the issue of the deduction of plaintiff's severance pay from any backpay award is not warranted.

II. OFFER OF REINSTATEMENT

Plaintiff argues that the Court should vacate its decision that plaintiff's damages for backpay are precluded because of plaintiff's failure to accept an unconditional offer of reinstatement. Citing *Pierce v. F.R. Tripler & Co.*, 955 F.2d 820 (2d Cir. 1992), plaintiff argues that a genuine issue of fact exists as to whether the offer or reinstatement was unconditional. However, the Second Circuit in *Pierce* held that "an unconditional offer of a job substantially similar to the one

denied the plaintiff, may, as a matter of law, toll back pay, . . ." *Id.* at 830. As discussed in the May 12, 1994 Order and Opinion the offer of reinstatement was unconditional and plaintiff has failed to raise a genuine issue of material fact as to whether the offer of reinstatement was unconditional. Plaintiff has cited nothing about the offer of reinstatement which would make it a conditional offer. The fact that layoffs had changed the composition of his work group, that Mr. Shackelford would still be his superior and that Carbide required an answer within three weeks do not make the offer of plaintiff's job back a conditional offer. Order and Opinion at pp. 9-12. Accordingly, reargument of the effect of the unconditional offer of reinstatement is denied.

III. CLARIFICATIONS

Plaintiff argues that the May 12, 1994 Order and Opinion must be clarified because it does not state 1) that plaintiff is entitled to front pay; 2) that plaintiff is entitled to compensatory damages under the New York State Human Rights Law; and 3) because footnote three of the Order and Opinion must be corrected.

In the May 12, 1994 Order and Opinion the Court stated that plaintiff could "not recover damages for lost wages because he continued to receive full pay as a severance benefit after he was offered his old job back." Order and Opinion at 12. Front pay may be offered as a remedy in appropriate cases where reinstatement is not a suitable remedy. *Whittlesey v. Union Carbide Corp.*, 742 F.2d 724 (2d Cir. 1984). In this case plaintiff waived his right to front pay when he declined Carbide's offer of reinstatement. *See Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 231-32 (1982); *see also Dominic v. Consolidated Edison Co. of New York, Inc.*, 822 F.2d 1249, 1258 (2d Cir. 1987) (plaintiff's failure to mitigate damages, by refusing substantially equivalent job, forecloses award of frontpay); *Reilly v. Cisneros*, 835 F. Supp. 96, 99 (W.D.N.Y. 1993) ("[i]f a plaintiff rejects an offer of substantially simi-

lar employment, he loses his right to pay from and after the time of such rejection"); *accord Rodgers v. Western Southern Life Ins, Co.*, 12 F.3d 668, 678 (7th Cir. 1993) (court refused to award front pay where plaintiff-employee declined offer of reinstatement).

Plaintiff also argues that footnote 12 of the Court's Order and Opinion should be clarified because it does not state that plaintiff may be entitled to compensatory damages under the New York State Human Rights Law. N.Y. Exec. Law § 296 *et seq*. The footnote does not indicate anything to the contrary and does not need to be clarified. Plaintiff's contention that the statement in footnote 3 that "all reduction in force programs force employees to leave a company" needs to be corrected is similarly without merit. The reduction of force program to which the Court refers was not voluntary and plaintiff agrees that his cessation of employment pursuant to the reduction in force was not voluntary. To the extent that clarification is required the phrase "all reduction in force programs" is hereby changed to read "all non-voluntary reduction in force programs."

For the foregoing reasons plaintiff's motion for reargument is denied. The parties will appear before the Court for a pretrial conference on August 11, 1994 at 9 a.m. in Room 302.

IT IS SO ORDERED.

Dated: New York, New York
July 28, 1994

/s/ ROBERT P. PATTERSON, JR.
Robert P. Patterson, Jr.
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 Civ. 6411 (RPP)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—v—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICAL DIVISION,

Defendants.

APPEARANCES

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ORDER AND OPINION

ROBERT P. PATTERSON, JR., U.S.D.J.

Defendants, Union Carbide, A.W. Lutz and W.E. Shackelford move for an order pursuant to Fed. R. Civ. P. 56(b) granting summary judgment to defendants, dismissing plaintiff's amended complaint which contains seven counts and awarding defendants attorneys' fees and costs. Plaintiff, Richard Lightfoot, moves for an order granting partial summary judgment for plaintiff on Counts I, II, III and V of his amended complaint. Plaintiff also moves to strike the affidavit of Joel E. Cohen, Esq. sworn to July 9, 1993 and a letter dated December 3, 1992 from the record, for further discovery pursuant to Fed. R. Civ. P. 56(f), for sanctions against defendants pursuant to Fed. R. Civ. P. 11, and for an award of attorneys' fee and costs in plaintiff's favor. Each of these requests will be discussed in turn.

I. BACKGROUND FACTS

In 1959, Plaintiff Richard Lightfoot accepted a position at Union Carbide Corporation ("Carbide") as a Chemical Engineer. Shortly after beginning his employment with Carbide plaintiff signed a Memorandum of Employee's Agreement. In the Agreement plaintiff assigned to Carbide all rights to any invention in which he was involved during the course of his

employment. In 1968, plaintiff was transferred to Carbide's New York City headquarters. In 1980, plaintiff was relocated from Carbide's New York City office to Carbide's new headquarters in Danbury, Connecticut. He continued to reside in New York City. In 1986, Plaintiff signed a second Memorandum of Employee's Agreement assigning Carbide his rights to his inventions. Wisehart Aff. submitted pursuant to local rule 3(g), at ¶¶ 1, 2, 4, 6.

In the 1980's, plaintiff held a variety of positions including Special Projects Manager and Marketing Manager for Surfactants. *Id.* at ¶ 5. On April 27, 1992, plaintiff was terminated from Carbide as part of a reduction in force program. He rejected the enhanced severance benefits offered by the program and instead received full pay as severance until February 1993. On December 3, 1992, Carbide made an offer to reinstate plaintiff to his former position; plaintiff rejected this offer. Cohen Aff., Exhs. G & H. In February 1993, plaintiff accepted a position with CRI, Inc. a consulting firm in the Chemical industry. *Id.* at ¶¶ 12, 14-16.

II. APPLICABLE LEGAL STANDARD

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

III. PLAINTIFF'S NEW YORK STATE AND FEDERAL AGE DISCRIMINATION CLAIMS

Defendants contend that they should be granted summary judgment as to Counts I and III of the amended complaint, plaintiff's federal and New York State age discrimination claims, because plaintiff cannot meet his burden of showing

that age was a determinative factor in his dismissal.[1] In order to prove discrimination based on age "[t]he plaintiff has the burden of proving that 'age was the 'determining factor' in his discharge in the sense that, 'but for' his employer's motive to discriminate against him because of age, he would not have been discharged.' " *Pena v. Battleboro Retreat*, 702 F.2d 322, 323 (2d Cir. 1983) (citation omitted). Defendants rely on plaintiff's deposition testimony in which he ascribed his termination to the jealousy, self-interest and competitive attitude of his immediate supervisor to support their motion for summary judgment.

Plaintiff urges utilization of the *McDonnell Douglas*[2] analysis of the evidence:

> In order to establish a prima facie case of termination of employment in violation of the ADEA, a plaintiff must show (1) that he was within the protected age group, (2) that he was qualified for the job, (3) that he was discharged, and (4) that the discharge occurred under circumstances giving rise to an inference of age discrimination.

Stetson v. NYNEX Service Co., 995 F.2d 355, 359 (2d Cir. 1993). "If a prima facie case is established, the employer must offer a legitimate, nondiscriminatory reason for its actions." *Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1155 (2d Cir. 1993). If the employer presents such a reason the burden is on the plaintiff to show that the proffered reason was pretext for discrimination. *Id.*

Under the *McDonnell Douglas* test Lightfoot has established the first three elements of a prima facie case because he: 1) was in the protected age group, 2) was qualified for the job he held and 3) was discharged.

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[1] Plaintiff's age discrimination claim under New York Executive Law § 239 *et seq.* is governed by the same standard as his ADEA claim, 29 U.S.C. § 623 *et seq. See Spence v. Maryland Casualty Co.*, 995 F.2d 1147, 1158 (2d Cir. 1993).

[2] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Defendants and plaintiff dispute whether the evidence shows that plaintiff's discharge occurred under circumstances that give rise to an inference of discrimination. Plaintiff was discharged as a result of a reduction in force at Carbide under a program called the "Enhanced Separation Program."[3] To effectuate this reduction of force supervisors at Carbide "forced-ranked" employees within a group to determine which employee should be terminated. The "Forced-ranking" system involved weighing the following factors: ability, effectiveness, versatility, value to continuing business operation, uniqueness, company service and reassignment potential. In plaintiff's case it was applied to a group of 13 employees of which Lightfoot was the oldest. Lightfoot Aff. in Opposition to Summary Judgment, Exhs. E and I. Plaintiff's main contention is that a report on the forced-ranking session in which Carbide made the decision to terminate him shows that age played a factor in his termination because the document contains the dates of birth of the employees forced-ranked and because plaintiff, the oldest person ranked, was terminated rather than a person under 40 who received an equal ranking. Lightfoot Aff. in Opposition to Summary Judgment, Exh. E. Plaintiff also bases his argument on a written comment and a non-verbal response (a look) by Mr. Shackelford, his superior, when plaintiff informed him that plaintiff intended to work until age 70. Lightfoot Aff. in Opposition to Summary Judgment, Exh. C.[4] The comment was made two years before

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[3] Plaintiff also argues in his cross-motion that partial summary judgment should be granted in his favor on the age discrimination claim because defendants failed to deny that the Enhanced Separation Program adopted by Carbide "has a coercive purpose and effect. Older employees who did not accept the separation package were force to leave the company in any event." Amended Complaint, ¶ 149. This point is without merit since all reduction in force programs force employees to leave a company.

[4] In a written evaluation of plaintiff's work in 1989, Shackelford wrote that:

> Dick [plaintiff] wants to work until he is 70 and wants to know how he can maximize his contributions during the next 15 years! I suggested his two areas of greatest demonstrated strength were

plaintiff was terminated and on its face does not give rise to an inference of discrimination based on age. *See Moore v. Eli Lilly & Co.*, 990 F.2d 812, 818 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 467 (1993) (supervisor's inquiry into employee's retirement plans after learning employee's age did not represent a discriminatory intent, but was a reasonable inquiry regarding employee's longevity). The look by Shackelford could be open to various interpretations.

Since plaintiff was the oldest employee, plaintiff's termination due to the forced-ranking procedure instead of an equally ranked younger employee gives rise to an inference of discrimination based on age. Here, however, plaintiff testified expansively during his deposition as to his conclusion that Mr. Shackelford's self-interest and competitiveness with plaintiff were the cause of plaintiff's termination from Carbide. Cohen Aff., Exh. C, Lightfoot Dep. at 122-25, 166-170. Plaintiff attempts to rebut defendants' use of his deposition testimony by directing the Court to other portions of his deposition testimony in which he stated that the treatment he received at Carbide vas due to age discrimination, and that he thought Mr. Shackelford was discriminating against him on the basis of age.[5] Lightfoot Aff. in Opposition to Summary Judgment, Exh. L, pp. 22-26, 163. Both excerpts are conclusions of plaintiff reached after his discharge, as is the plain-

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> in management of product safety and an incredible feel for tactical dynamics—ie, a super tactical product/ market manager. At this point this is the direction I would recommend for him.

Lightfoot Aff. in Opposition, Exh. C.

[5] Plaintiff also seeks to substantiate his claim of age discrimination by citing to his moving affidavit which merely states conclusory allegations of age discrimination. Defendants object to statements in Lightfoot's affidavit such as "[b]ias against older employees was (and is) a part of the permanent corporate psyche of Union Carbide Corporation . . ." Aff. at ¶60. Defendant correctly states that to the extent such statements are inconsistent with plaintiff's deposition testimony they must be disregarded because they do not create genuine issues of material fact. *See Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 925 F.2d 566, 572 (2d Cir. 1991); *Douglas v. Weil, Gotshal & Manges*, 1993 WL 364572 (S.D.N.Y. 1993).

tiff's testimony about Shackelford's self-interest and competitiveness.

Under these circumstances, where plaintiff's deposition testimony states more than one possible motivation for his employer's decision to terminate him, plaintiff's complaint must be examined as arising out of mixed motivation and *Price Waterhouse v. Hopkins*, 109 S.Ct. 1775 (1989) applies. In *Price Waterhouse*, the Supreme Court held that:

> An employer may not . . . prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. . . . The employer instead must show that its legitimate reason, standing alone, would have induced it to make the same decision.

Id. at 1791-92.

In this case Carbide's papers fail to set forth a legitimate and sufficient reason for its decision to terminate plaintiff, instead defendants rely on plaintiff's conclusory statements as to Shackelford's self-interest and competitiveness. Thus Carbide has failed to show that its legitimate reasons for terminating plaintiff standing alone would have induced it to make the decision to terminate plaintiff. Accordingly, summary judgment is inappropriate because an inference of age discrimination has been raised by the termination of plaintiff, the oldest member of the group of employees evaluated, rather than the equally-ranked younger employee in the group. Accordingly, genuine issues of material fact remain regarding Carbide's motives for terminating plaintiff. Defendants' motion for summary judgment on plaintiff's ADEA and New York State Human Rights claims is denied.[6]

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[6] Plaintiff moves for summary judgment on his age discrimination claim based on the fact that defendants did not verify their answer in response to plaintiff's verified complaint in violation of New York Civil Practice Law and Rule § 3016(f). However, since this action was brought in federal court "the Federal Rules of Civil Procedure 'govern the mode of proceedings in federal court . . . .' " *Harbor Seafood, Inc. v. June Foods, Inc.*, 1987 WL 15275 (E.D.N.Y. 1987) (denying plaintiff's motion for summary judgment predicated upon defendant's failure to comply

IV. THE LETTER OF REINSTATEMENT

In a December 3, 1992 letter to plaintiff Mr. Shackelford of Carbide made an unconditional offer to reinstate plaintiff to his prior position as market manager. Cohen Aff., Exh. G. Plaintiff responded to the letter through his counsel. Cohen Aff., Exh. H. In the response letter and in his motion papers plaintiff contends that the letter was an improper violation of Disciplinary Rule 7-104(a)(1) and that it should be stricken from the record pursuant to Fed. R. Evid. 408 because it was an offer of compromise.

In *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219, 241 (1982), the Supreme Court held that "absent special circumstance, the rejection of an employer's unconditional job offer ends the accrual of potential backpay liability." The letter in this case was sent by Mr. Shackelford on Carbide letterhead explaining that because another marketing manager had resigned Carbide was offering Mr. Lightfoot his old job back. The letter also stated that *"[t]his offer is unconditional."* Because plaintiff had received full pay as severance and continued to receive such pay after he received the offer Carbide contends that plaintiff is entitled to no backpay.

Plaintiff argues that the letter is "bogus" and is inadmissible evidence. Plaintiff's first objection is that the letter was sent directly to Mr. Lightfoot at a time when he was represented by counsel in violation of DR 7-104(a)(1).[7] Although the letter was not sent by defendant's counsel to Mr. Lightfoot, plaintiff contends that "[t]he contents of the Shackelford letter are such as to indicate that it must have been sent with

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with CPLR § 3016(f) in federal diversity action) (citing *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 438 (1974).

[7] DR 7-104(a)(1) states:

> During the course of the representation of a client a lawyer shall not:
>
> (1) Communicate or cause another to communicate on the subject of the representation with a party the lawyer knows to be represented by a lawyer in that matter unless the lawyer has the prior consent of the lawyer representing such other party or is authorized by law to do so.

the prior knowledge or consent of counsel for the defendants . . . ." Pl. Mem. in Support of Summary Judgment, p. 10. Despite plaintiff's presumption the evidence does not show that any disciplinary rule has been broken. At his deposition Mr. Shackelford testified that it was his idea to offer Mr. Lightfoot his job back after another employee decided to leave Carbide. Shackelford then conferred with Mr. Lawlor, Carbide's inside counsel, about whether he could offer Mr. Lightfoot the job and showed Lawlor a draft of the letter. Shackelford also testified that the language of the letter, particularly the term "unconditional," came from him. Shackelford Dep., pp. 26-46. Thus the November 1992 letter was not a violation of DR 7-104(a) because no evidence has been elicited that an attorney sent the letter or caused the letter to be sent.[8]

Plaintiff argues that the letter was an offer of compromise and is inadmissible under Fed. R. Evid. 408. However, plaintiff does not show any circumstances which would make the letter an offer of compromise and the letter on its face is unconditional and does not require Lightfoot to compromise his claims against the defendants. Although plaintiff's counsel's response to the offer by Carbide refers to settlement negotiations, there is no evidence that the offer letter was sent as part of those settlement negotiations; rather Mr. Shackelford testified that the idea to send the letter stemmed from a vacancy in his department and his thought that plaintiff could fill the position. Moreover, by the terms of the letter plaintiff was not required to drop his claims against defendants. Thus Fed. R. Evid. 408 is not a bar to the admission of the letter as an offer of compromise.

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[8] Plaintiff also asks the Court to strike the affidavit of Mr. Cohen, the defendants' attorney, because it is not based on personal knowledge. There is no basis upon which to strike Mr. Cohen's affidavit because it merely serves as a roadmap for the documentary evidence and deposition testimony produced during this litigation. *See Spence v. Maryland Casualty Co.*, 803 F. Supp. 649, 664 (W.D.N.Y. 1992), *aff'd*, 995 F. 2d 1147 (2d Cir. 1993); *Maier-Schule GMC, Inc. v. General Motors Corp.*, 780 F. Supp. 984, 988 (W.D.N.Y. 1991).

Plaintiff also contends that the letter does not end Carbide's backpay liability because the offer was not unconditional since it was predicated on Mr. Lightfoot having to accept or reject the letter by a certain date, it did not offer plaintiff increased benefits to which he claims he was entitled and because the job he was offered could not be the same because most of the people he worked with were no longer in the group. Although these may be deemed conditions, an offer for reinstatement is considered "unconditional" if the job offered is substantially equivalent to the position that the employee claims to have been wrongfully terminated from and if the employee does not have to drop his legal claims against the employer. *See Ford*, 458 U.S. at 232. The letter sent by Carbide to Lightfoot is an unconditional offer of reinstatement and serves to cut off Carbide's backpay liability. *See Ford*. Although plaintiff may pursue his federal and New York State age discrimination claims he cannot recover damages for lost wages because he continued to receive full pay as a severance benefit after he was offered his job back. Summary judgment is granted in the defendants' favor in all causes of actions as to Carbide's liability for backpay.

V. NEW YORK CITY HUMAN RIGHTS LAW CLAIM

Defendants contend that plaintiff's claim under the New York City Human Rights law must be dismissed because plaintiff has failed to allege that his complaint was filed with the New York City Commission on Human Rights or with the New York City Corporation Counsel prior to the commencement of this action and because there are no allegations that the defendants intentionally discriminated against him within the boundaries of New York City. Plaintiff argues that the New York City Human Rights Law should extend to his claim because he was living in New York City and performed work at home occasionally and because Carbide still has some offices in New York City. Plaintiff also alleges that the Early Separation Program adopted by Carbide was approved at a meeting in New York City. Its impact on him, however, occurred while he was employed in Connecticut. Lightfoot Aff. in Opposition, ¶¶ 265-266, 269-274.

Although plaintiff argues that summary judgment should not be granted in defendant's favor because he has "duly" filed his complaint with the New York City Commission on Human Rights or the New York City Corporation Counsel, he has not testified that he filed his complaint prior to commencing this civil action or provided the Court with an exhibit to support his claim that his complaint was filed prior to commencing this civil action as required under the City Law. Lightfoot Aff. in Opposition to Summary Judgment at ¶ 267; *see* New York City Administrative Code § 8-502. Moreover, plaintiff does not allege that defendants intentionally discriminated against him within the boundaries of New York City and the jurisdiction of the New York City Human Rights Commission does not extend to Connecticut. *See* N.Y. Gen. Mun. Law § 239-s; N.Y.C. Admin. Code § 2-201. Accordingly, summary judgment is granted in the defendants' favor on plaintiff's New York City Human Rights claim and Count II of plaintiff's amended complaint is dismissed.

VI. PLAINTIFF'S ERISA CLAIM

Section 510 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1140, provides that "[i]t shall be unlawful for any person to discharge . . . a participant or beneficiary . . . for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . ."

Plaintiff maintains that he has an ERISA claim against Carbide because there is a causal link between his discharge and the diminution of his pension benefits. Plaintiff has presented no evidence to show that his discharge was motivated by Carbide's desire to lessen his pension benefits. Plaintiff cites *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990), for the proposition that the reduction of benefits resulting from plaintiff's termination could reasonably be viewed as a motivating factor in his discriminatory treatment. However, in *Turner*, the Third Circuit did not find that a plaintiff's mere allegations that his benefits were reduced to be suffi-

cient evidence to support a claim for discrimination under ERISA. In fact, the Third Circuit stated:

> As we have noted, Turner's discharge did not deprive him of his pension. All Turner has shown is that his termination deprived him of the opportunity to accrue additional benefits through more years of employment. This kind of deprivation occurs whenever an ERISA employer discharges an employee and is not alone probative of an intent to interfere with pension rights.

Id. at 348. The court in *Turner* held that under the circumstances surrounding Turner's discharge Turner had not established a *prima facie* case of discrimination based on ERISA and that summary judgment was properly granted to the employer. Similarly, here plaintiff has only shown that his potential pension benefits were diminished by his termination, and although the court in *Turner* acknowledged that a plaintiff might be able to establish a prima facie case of ERISA discrimination if the reduction of pension benefits were substantial this is not such a case. *See Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1117 n.1 (2d Cir. 1988) ("[the Second Circuit's opinions] cannot be read to mean that mere cost savings and proximity to benefits are sufficient *per se* to create a genuine issue of fact requiring a trial."). Lightfoot's pension benefits have already vested and although his discharge resulted in his being unable to accrue further benefits, plaintiff has not presented any evidence that this was a motivating factor in his discharge. Indeed he was offered the opportunity to accrue additional benefits and chose not to do so when he rejected Shackelford's offer of reinstatement. Accordingly, summary judgment on plaintiff's ERISA claim is granted in defendants' favor and Count VI of the amended complaint is dismissed.[9]

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[9] Plaintiff argues that summary judgment in his favor on his ERISA claim should be granted because defendants failed to answer ¶49 of the Amended Verified Complaint and have "conceded that the separation program had a coercive purpose and effect . . . ." Pl. Brief in opposition, p. 13. After reviewing the Answer it is clear that the failure to deny paragraph 49 was a clerical oversight created by a page break.

VII. BREACH OF CONTRACT CLAIM

Plaintiff contends that Connecticut law should be applied to his breach of contract claim because under New York law the law of the state where the contract is to be performed applies, and in this case Carbide's office was located in Connecticut. *See Bergstein v. Jordache Enterprises, Inc.*, 767 F. Supp. 535, 541 (S.D.N.Y. 1991); *Babcock v. Jackson*, 240 N.Y.S.2d 743 (1963). Defendants argue that plaintiff's claim fails under either Connecticut or New York law.

Plaintiff maintains that the contract he entered into with Carbide provided that he could be terminated only if he failed to perform adequately. However, the two Memorandums of Employee's Agreement that he signed with Carbide expressly provide that: "[t]his agreement does not, of course, bind either party to any specific period of employment." Cohen Aff., Exh. D and E. Plaintiff maintains that he had a lifetime employment agreement with Carbide but does not give specifics, rather stating that Carbide represented to him that he had a life-time position with the company. Lightfoot Aff. at ¶¶ 239-247. Under Connecticut law these allegations are insufficient to defeat a summary judgment motion when employment was at will.

"In Connecticut, an implied employment contract may arise under the doctrine of promissory estoppel, where injustice to a promise who has acted in reliance can be avoided only by enforcement of 'a clear and definite promise which a promisor could reasonably have expected to induce reliance.' " *Manning v. Cigna Corp.*, 807 F. Supp. 889, 895 (D.Conn. 1991) (citation omitted). In *Manning*, the court granted summary judgment to the employer on the plaintiff's implied contract claim because the plaintiff could not provide any evidence "to support his unilateral understanding of an implied employment contract on the issue of discharge." *Id.*

Cohen Reply Aff., ¶5. Because plaintiff has suffered no prejudice due to this oversight, defendants' Answer is considered to have denied ¶49 of plaintiff's Amended Verified Complaint. *See Jewish Nat'l Fund, Inc. v. Garland*, 1985 WL 163 (S.D.N.Y. 1985); *Pelch v. Peninsula Gen. Hosp.*, 340 N.Y.S.2d 388 (2d Dept. 1973).

at 896. *See Anderson v. Coca Cola Bottling Co. of New York, Inc.*, 772 F. Supp. 77 (D. Conn. 1991); *Johnson v. Carpenter Technology Corp.*, 723 F. Supp. 180 (D. Conn. 1989). In this case plaintiff does not point to any clear and definite promise which was made to him by Carbide. The lack of a clear and definite promise of lifetime employment combined with the two Memorandums of Employee's Agreement which plaintiff signed support the conclusion that plaintiff's employment was terminable at will. New York law does not differ. *See Cucchi v. New York City Off-Track Betting Corp.*, 818 F. Supp. 647, 653 (S.D.N.Y. 1993); *Sabatey v. Sterling Drug, Inc.*, 514 N.Y.S.2d 209 (1987). Accordingly, Count IV of the amended complaint is dismissed and summary judgment as to plaintiff's implied contract claim is granted in the defendants' favor.

VIII. QUANTUM MERIT

In his complaint plaintiff alleges that he has a claim in quantum meruit against Carbide because of his participation in the making of inventions at Carbide. Defendants contend that plaintiff's claim for quantum meruit fails as a matter of law.

> In order to make out a claim in *quantum meruit*, the plaintiff must establish performance of his services in good faith, acceptance of the services by the persons to whom such services were rendered, expectation of compensation, and the reasonable value of such services.

Paper Corp. of U.S. v. Schoeller Technical Papers, Inc., 773 F. Supp. 632, 640 (S.D.N.Y. 1991) (citing *Martin H. Bauman Assocs. Inc. v. H & M Int'l Transport.*, 567 N.Y.S.2d 404, 404 (1st Dept 1991)).

Defendants contend that plaintiff has not established that he had a reasonable expectation of compensation for his role in developing the inventions. Plaintiff argues that he has shown as required by New York precedent that the services he provided by participating in the inventions were "so distinct from the duties of his employment and of such a nature that it would be unreasonable for the employer to assume that they

were rendered without expectation of further pay." *Robinson v. Munn*, 238 N.Y. 40, 43 (1924).[10] However, during his deposition plaintiff testified that:

> It was everything that the marketing manager's job was to do. I mean our whole role . . . . Our reason for existence, reason for this huge—not just me but there was 100 odd marketing people, maybe 10 marketing managers, probably 300 R&D involved in this effort, the whole reason was to develop new products, new product lines.

Lightfoot Dep. at 97.

Mr. Lightfoot also testified that although his job included the development of new products he would not develop all new products, just those related to surfactants, the group for which he was a marketing manager.

> My job was new products and surfactants and I was just bending my talents to it the best way I knew to make the best for the company but not outside surfactants. Now, I don't recall any particular product coming out that was outside surfactants. I will say this, if we came up with an idea that was outside surfactants, again, I have no recollection of that, I would have made it my duty, my business to get the right people somewhere within Carbide both R&D and commercial people to alert them of the idea. I wouldn't do more than alert them of the idea.

Lightfoot Dep. at 75.

In an August 26, 1992 sworn declaration to the United States Patent and Trademark Office regarding one of the inventions at issue, plaintiff asserted:

> That I was not employed or assigned to perform research, development, or exploration work, but the invention is nevertheless related to the work or duties I was employed or assigned to perform;

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[10] Plaintiff does not argue that any law other than New York law applies to his quantum meruit claim.

> That the invention was made during working hours and with the use of the facilities, equipment, materials, funds, information and services of Union Carbide Chemicals and Plastics Company, Inc.;

Cohen Aff., Exh. F, p. 2. This declaration by plaintiff, the provisions of the two Memorandums of Employee's Agreement in which plaintiff agreed to assign all his inventions to Carbide and his deposition testimony all establish that plaintiff's participation in the development of the inventions was not so far outside of the scope of his employment so that Carbide would have to provide extra compensation for those services.

Although plaintiff claims that Carbide should have known that the work plaintiff performed in terms of the inventions entitled him to additional compensation, plaintiff has submitted no evidence that he was promised or asked for anything more than consideration for a promotion.[11] Summary judgment in defendants' favor is granted with regards to plaintiff's quantum meruit claim based on his contributions to inventions and new products at Carbide.

IX. UNJUST ENRICHMENT

Unjust enrichment is a quasi-contractual claim which allows a party to recover to prevent another party from being unjustly enriched at his expense. *Bradkin v. Leverton*, 309 N.Y.S.2d 192, 196 (1970); *Connecticut Nat'l Bank v. Chapman*, 216 A.2d 814, 817-18. Count VI of plaintiff's verified amended complaint asserts a claim for unjust enrichment due to plaintiff's participation in the inventions. Defendants argue that plaintiff's claim for unjust enrichment fails as a matter of law because Carbide was entitled to any benefits that Carbide received from plaintiff's participation in the inventions by virtue of the two Memorandums of Employee's Agreement which plaintiff signed.

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[11] His March 1990 performance evaluation stated that consideration for a promotion required more than for plaintiff to develop new products, it also required plaintiff to improve his interpersonal skills. Lightfoot Aff. in Opposition, Exh. C.

In 1959, plaintiff signed a Memorandum of Employee's Agreement, in which he agreed that:

> In consideration of my employment by Union Carbide Corporation . . . I agree . . . . [t]o assign to Union Carbide Corporation all inventions made by me, alone or jointly with others, in the course of such employment, relating to the business of the Corporation or resulting from tasks specifically assigned to me by the Corporation.

Cohen Aff., Exh. D. In 1986, plaintiff signed another Memorandum of Employee's Agreement with the same provision. Cohen Aff., Exh. E. Nevertheless plaintiff claims that "Carbide has been unjustly enriched by receiving the benefit of new product lines and inventions developed by plaintiff pursuant to its requests." Complt. at ¶ 141. Plaintiff contends that because his employment was terminated that the non-occurrence of the condition precedent that he be employed discharged his duty to assign under the terms of the employment agreement. However, plaintiff was employed by Carbide for 33 years, thus the condition precedent that he be employed by Carbide occurred and plaintiff is obliged to assign the rights to the inventions he made during the course of his employment to Carbide.

Plaintiff cites to *Eenkhoorn v. New York Tel. Co.*, 514 N.Y.S.2d 160 (1st Dept. 1987), claiming that Carbide is not entitled to summary judgment because issues of fact exist as to whether the company has been unjustly enriched. *Eenkhoorn* is distinguishable from this case because in *Eenkhoorn* there was no agreement between the employee and the employer pertaining to the development of ideas. Thus questions of fact existed as to whether the company had a policy of remunerating employees for suggestions and as to whether the company had been unjustly enriched by using the employee's ideas. *Id.* at 161. In this case there is an agreement between the employee and the employer as to the assignment of inventions, and plaintiff has presented no proof whatsoever that Carbide had a policy of paying employees for new inventions. Accordingly, Count V of plaintiff's amended

complaint is dismissed and defendants are granted summary judgment on plaintiff's unjust enrichment claim.

X. TORTIOUS INTERFERENCE WITH CONTRACT CLAIM

Defendant Shackelford seeks to dismiss plaintiff's claim against him for tortious interference with contract because the venue is improper and because it fails as a matter of law. Plaintiff contends that the venue is proper under Section 7(c)(1) of the ADEA (29 U.S.C. § 626(c)), and that the defendants have waived their venue objections under Fed. R. Civ. P. 12(h)(1).

28 U.S.C. 1391(b) provides in relevant part:

> A civil action . . . may be brought in (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred . . . or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Venue in this district is inappropriate under Section 1391(b)(1) because at the time the suit was commenced defendant Shackelford was a resident of Connecticut, defendant Lutz was a resident of the State of New York and Carbide (for the purposes of this motion) was both a resident of New York and Connecticut. Since a substantial portion of the acts or omissions giving rise to plaintiff's cause of action for tortious interference with contract occurred in Connecticut, plaintiff's place of employment, venue in Connecticut would be appropriate.

Plaintiff contends that venue is proper under Section 7(c)(1) of the ADEA, 29 U.S.C. § 626(c)(1) and under the New York Law Arm statute, New York Civil Practice Law and Rules § 302. Section 7(c)(1) of the ADEA provides that: "[a]ny person aggrieved may bring a civil action in any court of competent jurisdiction." However, this does not relieve the parties of establishing proper venue. *See Quinn v. Bomar Pub-*

lishing Co., 445 F. Supp. 780 (D. Md. 1978) (venue for ADEA claim lay in district in which plaintiff was discharged). Plaintiff states in a conclusory fashion that Shackelford is subject to personal jurisdiction under the New York long arm statute without attempting to show why the necessary elements for such jurisdiction have been met. Because no evidence has been presented that Shackelford transacts any business within the state of New York or that he derives substantial revenue from in interstate or international commerce, the New York long arm statute does not provide this Court with personal jurisdiction over Shackelford. N.Y. Civ. Prac. L. & R. § 302. Moreover, contrary to plaintiff's assertions, defendants have not waived their venue objections under Fed. R. Civ. P. 12(b) since in their Answer and in their motion papers the venue objection was properly asserted. Answer ¶ 166.

Plaintiff's tortious interference claim also fails as a matter of law. Under Connecticut law plaintiff's claim is barred by the Workers Compensation Act because plaintiff failed to allege that his employer, Carbide, directed Shackelford to commit the tort. *Vorvis v. Southern New England Tel. Co.*, 821 F. Supp. 851, 856 (D. Conn. 1993) ("intentional tort claim is barred unless the actor is acting with the knowing authorization of the employer") (citing *Jett v. Dunlap*, 425 A.2d 1263 (Conn. 1979)). Plaintiff's tortious interference with contract claims also fails under New York law because plaintiff may not circumvent the lack of a cause of action for abusive or wrongful discharge of an at-will-employee under New York law by casting his cause of action as another intentional tort. *Ingle v. Glamore Motor Sales, Inc.*, 538 N.Y.S.2d 771, 774 (1989) ("the plaintiff here cannot be allowed to evade the employment-at-will rule and relationship by recasting his cause of action in the garb of a tortious interference with his employment"); *Murphy v. American Home Products Corp.*, 461 N.Y.S.2d 232 (1983) (plaintiff not allowed to subvert the traditional at-will-contract rule by casting his cause of action as one for intentional infliction of emotional distress or as a prima facie tort). Accordingly, Count VII of plaintiff's

amended complaint against defendant Shackelford for tortious interference with contract is dismissed.

XI. PLAINTIFF'S DISCOVERY REQUESTS

Plaintiff's request for further discovery was denied in this Court's Order of November 22, 1993 and the order of December 6, 1993 pending the outcome of the motions decided herein. The request for further discovery is now denied because plaintiff failed to make a motion pursuant to Fed. R. Civ. P. 37 to compel production of the documents requested but not provided and because plaintiff has not provided the Court with evidence of any efforts by his counsel to obtain these documents from April 23, 1993 to the bringing of this motion for further discovery on September 8, 1993. Furthermore, defendants state that some of the requested documents are not relevant, have already been produced pursuant to earlier requests or cannot be produced because they do not exist. *Cf.* Order and Opinion of December 6, 1993. Plaintiff has failed to show how each of the document requests are relevant to his case and how the requested documents will produce any genuine issue of material fact as required by 56(f). *Burlington Coat Factory Warehouse Corp. v. Esprit de Corp* 769 F.2d 919, 926 (2d Cir. 1985). Accordingly, plaintiff's motion for discovery of documents listed as (a) through (b1) in his affidavit is denied without prejudice to plaintiff renewing the motion, within twenty days of the date of this opinion, after following the proper procedure to obtain such discovery.

XII. CONCLUSION

Summary judgment is granted in defendants' favor on all claims except for plaintiff's federal and New York State age discrimination claims. Count II, IV, V, VI, and VII of plaintiff's amended complaint are dismissed. Although plaintiff is entitled to a trial to determine whether Carbide discriminated against him on the basis of age, if he prevails his

damages will be limited as he cannot recover damages for lost wages.[12]

Plaintiff's motion for partial summary judgment for plaintiff on Counts I, II, III and V of his amended complaint is denied. Plaintiff's motion to strike the affidavit of Joel E. Cohen, Esq. sworn to July 9, 1993 and a letter dated December 3, 1992 from the record, for further discovery pursuant to Fed. R. Civ. P. 56(f) and sanctions against defendants pursuant to Fed. R. Civ. P. 11 is also denied. The parties shall bear their own costs. The parties will appear before the Court for a pre-trial conference on May 27, 1994 at 9 a.m. in Room 302.

IT IS SO ORDERED.

Dated: New York, New York
May 12, 1994

/s/ ROBERT P. PATTERSON, JR.
Robert P. Patterson, Jr.
U.S.D.J.

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[12] Compensatory and punitive damages are unavailable under ADEA. *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143 (2d Cir. 1984).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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92 CIV. 6411 (HB)

RICHARD HALL LIGHTFOOT,

Plaintiff,

—against—

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

AFFIDAVIT OF RICHARD H. LIGHTFOOT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

RICHARD H. LIGHTFOOT, being duly sworn, deposes and says:

1. I am the plaintiff in the above-entitled action.

2. This affidavit is respectfully submitted in support of my motion pursuant to 28 U.S.C. §§ 144 and 455(b)(1), to disqualify Hon. Harold Baer, Jr., from conducting any further proceedings in the above-entitled litigation on the grounds that he has personal bias and prejudice against me and, in addition, has personal knowledge of disputed evidentiary facts, and on the further grounds that he should disqualify

himself as required under 28 U.S.C. § 455(a) because his impartiality might reasonably be questioned.

3. The affidavit is also submitted in support of my motion pursuant to Fed.R.Civ.P. 59(e) to alter or amend the Order and Opinion of Judge Baer dated October 24, 1995, and entered on October 26, 1995, by vacating it as a result of the foregoing circumstances, and also because it constitutes an infringement of my Constitutional and statutory jury trial rights.

4. The facts and reasons for my belief that bias or prejudice exists on the part of Judge Baer such as to require him to proceed no further in this litigation pursuant to 28 U.S.C. §§ 144 and 455 are set forth below:

(a) Shortly prior to the trial of the case, on June 21, 1995, Judge Baer met separately with me and my counsel for the purpose of attempting to compel me to agree to settle the case.

(b) At that conference, Judge Baer indicated distaste for the case and said in substance that it was a petty case that should be settled.

(c) It appeared to me that Judge Baer had also formed a dislike for the case because it had been reassigned to him from Judge Patterson just on the eve of when it was scheduled to be tried, causing a severe disruption to Judge Baer's schedule, as evidenced by the fact that the trial had to be conducted under severe time constraints in tandem with an important criminal case before him.

(d) In addition it appeared to me, based upon what he said, that Judge Baer felt upset by the fact that he had inherited a case with a litigation history and substantive rulings by Judge Patterson that Judge Baer felt obligated to apply in the trial of the case even though Judge Baer might not have so ruled himself and even though such rulings virtually

guaranteed that there would be a highly contested appeal, and perhaps the necessity for a new trial.

(e) However, Judge Baer failed to even follow Judge Patterson's rulings, as he stated that he was required to do, because it was Judge Baer himself who dismissed my Age Discrimination in Employment Act claim, not Judge Patterson, as Judge Baer admitted in his Opinion and Order dated October 24, 1995, at pp. 2-3, thus undercutting my claim for recovery of attorney's fees which are mandatory in ADEA cases under *Hagelthrone v. Kennecott Corporation*, 710 F.2d 76 (2d Cir. 1983).

(f) During the discussion, Judge Baer indicated a negative point of view regarding the merits of my claim for age discrimination and made statements about them that were highly derogatory.

(g) Judge Baer then put pressure on me to accept a settlement amount of $100,000 that he indicated that he had reason to believe that he thought the other side would accept.

(h) The settlement figure that Judge Baer attempted to compel me to accept would have entirely destroyed any economic benefit to me in having prosecuted this litigation, as the Judge very well knew.

(i) In response I told Judge Baer that I had a lot more invested than that in the case and that I couldn't possibly settle on those terms particularly since I was convinced that I had been repeatedly discriminated against by defendants on the basis of age.

(j) I also stated specifically to Judge Baer with what I had invested in the case in my time, effort, and expenses, I wanted a jury to hear my case and make its own determination.

(k) I felt quite strongly about this and repeated several times my desire for a jury determination as to my claims.

(l) Judge Baer responded in a hostile manner to me both verbally and in his demeanor.

(m) Moreover, Judge Baer indicated to me that he did not think that it was "reasonable" for me to want to go to the jury and that I should settle for the figure that he attempted to impose upon me.

(n) The figure that Judge Baer attempted to impose upon me was the outgrowth of his separate conversations in another room with defendants' representatives and counsel.

(o) In the course of such discussions, Judge Baer obviously was influenced to form an opinion as to the value of the case as a result of *ex parte* communications which was contrary to my interests and also contrary to what I had been advised by my own counsel.

(p) When I told Judge Baer that I desired to have the jury determine the matter Judge Baer reacted with hostility to me personally, and abruptly terminated the discussions.

(q) The ensuing events demonstrated his personal prejudice against me because on June 23, 1995, he unilaterally determined that I was not entitled to claim pretermination damages on statute of limitation grounds despite the fact that the three-year period under which such claims could be made had not expired at the time of my termination. (TR 6/21/95, p. 54) His action in doing so was in furtherance of his attempt to force me to settle for a small amount.

(r) Moreover, Judge Baer dismissed my claim under the Age Discrimination in Employment Act, even

though Judge Patterson specifically refrained from doing so, and attempted to cause prejudice by incorrectly stating that I had agreed that the "ADEA cause of action must be dismissed," (TR 6/23/95, pp. 2-3) an incorrect statement that my counsel had to point out to the Judge, to his displeasure, as is evidenced in his action then and thereafter (TR 3-4), the purpose of which was to further compromise and reduce my claim by eliminating the basis upon which I sought to recover attorney's fees, as shown in his decision of October 24, 1995, (a copy of which is annexed hereto as Exhibit A).

(s) Again, the evident purpose of Judge Baer was to cause prejudice to me by reducing the value of my lawsuit.

(t) In addition, because I had not agreed to the very strong pressure that he asserted on me to settle the lawsuit, his Order and Opinion of October 24, 1995, sets forth a damage figure of $75,000, only 10 percent of what the jury determined, and is also less than the amount that Judge Baer sought to compel me to settle for on June 21, 1995, namely, $100,000.

(u) Because I refused to settle for $100,000 it is apparent to me that Judge Baer's figure of $75,000 was intended to punish me for exercising my jury trial rights instead of clearing his docket by settling the case. Judge Baer intended to deprive me of the verdict which the jury returned and put a value of the case which was 25 percent less than what he himself indicated would have been in his view a viable settlement figure after I had gone through the further time, effort, expense and risk of proceeding to try the case over an extended period of time.

(v) Thus it is apparent that Judge Baer's Order and Opinion was not arrived at in good faith but an outgrowth of prejudice against me and should be vacated for that reason.

(w) The punitive purpose of the Order and Opinion dated October 24, 1995, is made clear by the fact that, at the time he issued that Order and Opinion, he already was aware, based upon my attorney's fees application, that the amount that I had invested in the case for attorney's fees was substantial, since nearly 3,000 hours of attorneys' time was involved.

(x) Judge Baer therefore knew, based upon what I had said at the conference on June 21, 1995 that, considering what I had invested in the case in attorney's fees, I would be a substantial loser, near the end of my resources, at his figure of $75,000, *after the trial*, even though the jury strongly had found me to be a victim of age discrimination as set forth in the special interrogatories submitted to the jury annexed hereto as Exhibit B (TR 6/29/95, p. 621). Thus the punitive intent of Judge Baer is obvious in the context of the discussions on June 21, 1995.

(y) The same circumstances that indicate prejudice against me on the part of Judge Baer also are indicative of bias of prejudice in favor of my adversaries in this case.

(z) The settlement figure that Judge Baer attempted to compel me to accept undoubtedly was the outgrowth of discussions that he had had with my adversary.

(aa) Moreover, the testimony presented in the trial of my case by Dr. Stanley L. Portnow, an eminent forensic psychiatrist, on the basis of which the jury returned its verdict, indicated severe health

impairment as a result of the stress and trauma to which I have been subjected by defendants.

(bb) The health impairment and trauma that Dr. Portnow testified to was much greater than that in a jury verdict in the New York Civil Court in *McCord v. National Benefit Life Insurance et al.*, (N.Y. Civ. Ct. 131501/91, 1994), under which the jury returned a verdict of $1.29 million (Exhibit C annexed hereto.)

(cc) I am informed that Mr. Cohen, counsel for defendants, was well aware of that decision because he knew that his former firm had represented the defendants in that case.

(dd) The testimony of Dr. Portnow and myself concerning stress and trauma that resulted in the impairment of my health also established that the decision of Judge Patterson in granting summary judgment to the defendants on the basis that I should have accepted an offer to return to employment at Union Carbide gave rise to a disputed issue of fact and never should have been decided on summary judgment. Thus my claim under the ADEA should not have at any time been dismissed, but should have been utilized on the basis of the same evidence going to the jury as to whether or not my nonacceptance of the purported offer in the letter of December 3, 1992 (Exhibit D annexed hereto) was reasonable in view of my medical and health complications.

(ee) Obviously, the jury in this case would have concluded that I had justification for not returning to the same situation that endangered my health and, in such circumstances, my claim for backpay and frontpay as permitted under the Age Discrimination in Employment Act was viable.

(ff) Further, the Order and Opinion of Judge Baer regarding remittitur is further evidence of bias and prejudice because the cases in which he refers to amounts received involve pain and suffering and did not involve health impairment and injury to business reputation, as in my case, both of which were elements that it had been conceded, even by defendants' counsel, were appropriate for the jury to consider. The evidence presented regarding the loss of my business reputation, based upon my own testimony itself came to $1,500,000 over the ten-year period of my remaining worklife expectancy. (TR 87, a copy of which is annexed hereto as Exhibit E.)

(gg) Finally, the bias and prejudice of Judge Baer is indicated by the fact that I am informed by counsel that Judge Patterson specifically agreed to review the question of pretermination damages based upon the situation that had been called to his attention in view of pleadings in my complaint making a claim for pretermination damages but that, even though Judge Baer had been made well aware that Judge Patterson did intend to review the claim for pretermination damages, as shown in my attorney's letters to Judge Baer of June 7, 1995, and June 9, 1995, annexed hereto as Exhibit F, Judge Baer insisted on treating the matter as having been previously finally disposed of by Judge Patterson, even though he well knew that Judge Patterson would have proceeded to consider the matter had the case not suddenly and arbitrarily been reassigned from Judge Patterson to Judge Baer virtually on the eve of when it was scheduled to go to trial.

5. During the meeting with Judge Baer on June 21, 1995, at which he attempted to compel me to settle at a figure that

would have produced a net loss to me, Judge Baer admitted that he had had one or more extended *ex parte* discussions with Judge Patterson concerning the case following its transfer from Judge Patterson.

6. From what Judge Baer said it was apparent that the hostile attitude of Judge Baer toward both the merits and the trial of my case was affected and influenced by the *ex parte* discussions with Judge Patterson.

7. Such *ex parte* discussions about my case are further grounds requiring disqualification pursuant to 28 U.S.C. § 455(b), and also create an appearance of impropriety pursuant to 28 U.S.C. § 455(a) because they affected the attitude of Judge Baer toward me and my case, and his dislike of having to try it under the circumstances involving its surprise assignment to him.

8. The grounds for disqualification described above have caused irreparable injury to me, violation of my right to Due Process of the Law guaranteed by the Fourteenth Amendment of the United States Constitution, and the abridgment of my jury trial and Due Process rights under Art. 1, §§ 1, 2, 6 and 8 of the New York Constitution.

10. Although the jury found that I had been injured as a result of unlawful age discrimination, the decision of Judge Baer reducing my damages to one-tenth of what the jury awarded has provided not a remedy for, but instead a very substantial aggravation of the injury suffered by me as a result of such illegal activities as the jury found the defendants to have committed.

WHEREFORE, Hon. Harold Baer, Jr., U.S.D.J., should be disqualified from conducting any further proceedings in the above entitled litigation and his Order and Opinion dated October 24, 1995, and entered October 26, 1995, should be vacated.

Respectfully submitted,

/s/ RICHARD HALL LIGHTFOOT
Richard Hall Lightfoot

Sworn to before me this
28th day of October, 1995

/s/ JOAN LIPIN
Notary Public

[LETTERHEAD OF UNION CARBIDE CORPORATION]

December 3, 1992

FEDERAL EXPRESS
RETURN RECEIPT REQUESTED

Mr. Richard H. Lightfoot
301 East 75th Street
New York, New York 10021

Dear Dick:

As you know, early this year we concluded that there was a need for a reduction in the number of employees in the Industrial Chemicals Division Ethylene Oxide Derivatives Marketing organization, and we decided to eliminate one of the three Market Manager positions. After evaluating the personnel involved, we told you on April 27 of our decision to eliminate your position. Because another position was not found for you internally, your employment was terminated as of June 30.

Recently Dave Roberts, one of the two Market Managers who were retained to do the remaining work, has resigned. By not replacing Dave Roberts, we are able to achieve, through voluntary attrition, the elimination of a Market Manager position.

As a result, we are able to offer you resumption of the Market Manager position that you held prior to its elimination earlier this year. Your return would be on the same terms and conditions as existed on April 27, without loss of Company Service.

This offer is unconditional.

Please complete the bottom portion of this letter and return it to me in the enclosed self-addressed, stamped envelope. If I do not receive a response by Monday, December 28, 1992, I will assume that you have rejected this offer.

Sincerely yours,

/s/ W. E. SHACKELFORD
W. E. Shackelford

INITIAL ONE:

_____ I accept the job offer as outlined above.
_____ I reject the job offer as outlined above.

ICD MARKETING
GROUP RATINGS
APRIL, 1992

Name	DOB	Abillity	Effect.	Versatility	Value	Uniq.	Reassign. Potential	Co. Service	SUM
Keel, A.T.	7/29/53	5	5	4	5	4	5	4	32
Rogers, E. C.	6/2/58	4	5	5	3	5	5	4	31
White, J.B.	3/27/42	4	4	4	5	5	3	5	30
Dillan, K.W.	9/24/54	4	4	3	4	5	4	4	28
Azsoth, G.	8/10/44	3	3	5	4	4	4	4	27
Barna, D.P.	10/10/47	4	4	4	3	3	3	4	25
Brymer, B.J.	1/11/46	3	3	2	3	3	3	5	22
Elling, G. F.	7/4/44	3	3	2	4	3	3	4	22
Hartjen, J. K.	6/28/49	4	3	2	4	3	3	4	23
Roberts, D.G.	7/8/59	3	3	2	3	3	4	3	21
Goebel, M.R.	8/20/52	3	2	3	3	3	2	4	20
Lightfoot, R.H.	6/22/35	3	3	2	3	3	1	5	20

Constitutional and Statutory Provisions Involved

United States Constitution, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in airy Court of the United States, than according to the rules of the common law."

Pertinent Portions of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 et seq.:

29 U.S.C. § 626(b):

> "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter, the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance

with the requirements of this chapter through informal methods of conciliation, conference, and persuasion."

29 U.S.C. § 626(c)(1):

"Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided*, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter."

29 U.S.C. § 626(c)(2):

"In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action."

29 U.S.C. § 626(d):

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

Fair Labor Standards Act, of 1938, as amended 29 U.S.C. §§ 215 et seq.

§ 216 Penalties

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under sec-

tion 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the can may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

§ 255 Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C.A. § 201 et seq.], the Walsh Healey Act [41 U.S.C.A. § 35 et seq.], or the Bacon-Davis Act [40 U.S.C.A. § 276a et seq.]—

(a) if the cause of action accrues on or after May 14, 1947—may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued;

Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 1 et seq.

§ 144 Bias or prejudice of judge

"Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further

therein, but another judge shall be assigned to hear such proceeding."

§ 455 Disqualification of justice, judge or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Civil Rights Act of 1964, Title VII, 42 U.S.C., §§ 2000e-5(g)

§ 2000e-5(g) Injuctions; appropriate affirmative action; equitable relilef; accrual of back pay; reduction of back pay; limitations on judicial orders

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable."

(2)

Supreme Court, U.S.
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No. 98-1918

In the

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

vs.

UNION CARBIDE CORPORATION,
A.W. LUTZ, President, Industrial Chemicals Division,
and W.E. SHACKELFORD, Vice President,
Industrial Chemicals Division,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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38pp

Rule 29.6 Statement

Pursuant to Rule 29.6 of the Rules of this Court, respondent Union Carbide Corporation states that it has less than 100% ownership interest in the following subsidiaries and affiliates that have issued shares to the public: Administration y Servicios Carmex, S.A. de C.V.; Cia National De Calcareous e Derivados; Concalcarbureto de Calcio S.A.; Electrometalurgia Sandade Ltda.; GenEx, Ltd.; Genesis, Ltd.; Hill Equipment Co.; Illini Tec Systems, Inc.; Nitropet, S.A.; Operadora Perinote, S.A. de C.V.; Oxigenio Edy, S.A.; S.A. Rapidox Rio Commercio e Participacoes; Rapidox Gases Industries Ltda.; U.C. Investments Limited; Unigas S.p.A.; Union Carbide Canada Limited; Union Carbide Mexicana, S.A. de V.C.; Union Gas Company Limited; Union Carbide Pakistan Limited; and Welders Supply Company.

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No. 98-1918

In the

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

vs.

UNION CARBIDE CORPORATION,
A.W. LUTZ, President, Industrial Chemicals Division,
and W.E. SHACKELFORD, Vice President,
Industrial Chemicals Division,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Statutory Provisions Involved

Other than certain jurisdictional statutes, the statutory provisions involved in this case are the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*; the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*; and the Judiciary and Judicial Procedure Act, 28 U.S.C. §§ 144 and 455. The relevant portions of ADEA and ERISA that are not set out in petitioner's appendix are set out in respondents' appendix (hereafter, "Res. App.") at A6-A7.

Contrary to petitioner's suggestion, this case does not involve the Fair Labor Standards Act, 29 U.S.C. §§ 216 and 255, or Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(g).

Counterstatement of the Case

This is a highly factual case, carefully evaluated and correctly decided by both the trial court that dismissed certain of petitioner's claims prior to trial and remitted the award granted by the jury at the first trial in this case (hereafter, the "First Trial"), and by the Court of Appeals that ultimately affirmed the judgment after the second trial in this case (hereafter, the "Second Trial") and affirmed all of the district court's other decisions in all respects.

Petitioner, a former marketing employee at Union Carbide Corporation ("Carbide"), was terminated by Carbide effective June 30, 1992 in connection with a reduction in force. Petitioner was selected for termination because of his low ranking in a ranking session conducted by his managers of the twelve (12) marketing employees in his business group.[1] Immediately upon his termination, petitioner began receiving severance pay from Carbide which entitled him to his full salary and benefits through February 1993. Petitioner also began collecting a $61,000 per year pension.

In December 1992, because another marketing employee left petitioner's former business group, and while petitioner was still receiving severance payments from Carbide, Carbide offered petitioner his former job back at the same pay and benefits and without any loss of service credit. The offer letter sent by Carbide to petitioner stated that the offer

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[1] Petitioner asserts in his Statement of the Case that he experienced retaliatory demotions in the years prior to his termination. (*See* Petition for a Writ of Certiorari (hereafter, "Pet.") at 3). No such finding was made by the jury or the lower courts but, rather, this claim was dismissed as untimely, as set forth *infra* pp. 15-17.

was unconditional and gave petitioner three weeks to accept the offer. Petitioner's attorney protested the offer of reinstatement and petitioner never accepted the offer.

Instead, in February 1993, before his severance payments ended, petitioner accepted a position with a consulting firm for Carbide's competitors in the chemical industry, CPI, Inc. ("CPI"). CPI had been courting petitioner since early summer 1992 and petitioner has worked continuously for CPI as a consultant from February 1993 through the Second Trial in this case in January 1998.

After rejecting Carbide's reinstatement offer, petitioner instead pursued claims against respondents that Carbide terminated him due to his age in violation of the ADEA, the New York Human Rights Law ("NYHRL"), N.Y. Exec. Law § 290 *et seq.*, and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.*; that Carbide terminated him in order to interfere with his pension benefits in violation of ERISA; and for a myriad of common law causes of action.

After discovery was completed, respondents moved the district court for summary judgment dismissing petitioner's complaint in the entirety. The district court granted partial summary judgment to respondents and dismissed all but petitioner's age discrimination claims under the ADEA and the NYHRL. Further, the district court held that because petitioner had rejected Carbide's December 1992 bona fide offer to reinstate him to his former position, petitioner could not recover back or front pay in the event that he prevailed on his age discrimination claims at trial. (*See* petitioner's appendix (hereafter, "Pet. App.") at 81a-93a).

At a pre-trial conference in June 1995, at petitioner's request, the district court reconsidered petitioner's claims for pre-termination discrimination, relating to alleged discriminatory demotions petitioner experienced in the years prior to his termination. The district court ruled that petitioner's claims for pre-termination discrimination were

time-barred. (Pet App. at 65a-66a; Res. App. at A1-A4). The district court also ruled at the June 1995 conference that because petitioner was precluded from recovering damages for back and front pay and because petitioner had not sought any other form of relief under ADEA, petitioner's ADEA claim must be dismissed. (Res. App. at A1-A4).

At the June 1995 pre-trial conference, the district court also attempted to settle the case. In this connection, with the consent of all parties, the district court met separately with petitioner and with respondents. However, because the parties were too far apart in the amounts they were willing to offer and accept, respectively, a settlement could not be reached. Accordingly, petitioner's NYHRL claim proceeded to trial before a jury, at which petitioner could seek only compensatory damages under the NYHRL, but not back or front pay. The jury returned a verdict that Carbide had terminated petitioner because of his age in violation of the NYHRL and awarded petitioner $750,000 for mental anguish and damage to reputation.

Thereafter, respondents moved alternatively for a new trial, a new trial on damages or remittitur of the damages award on the grounds that, *inter alia*, the amount of the award was unsupported by the evidence of damages presented at trial. The district court denied respondents' motion for a new trial but granted respondents' motion for remittitur. Thus, in accordance with New York Civil Practice Law & Rules § 5501(c), that provides for the remittitur of excessive jury verdicts under New York law, the district court remitted the jury's award to $75,000. In connection with its decision, however, the district court failed to offer petitioner the option of either accepting the remitted award or electing to have a new trial on damages. (Pet. App. at 54a-62a).

Subsequent to the district court's grant of a remittitur, petitioner moved to disqualify the district judge from any further proceedings in the action on the ground of alleged bias. Petitioner based his claim of bias upon the district judge's comments and actions in meeting separately with the petitioner and with respondents in an effort to settle the action at the June 1995 pre-trial conference and upon the district court's order remitting the excessive jury award. The district court denied petitioner's motion. (Res. App. at A5).

At that point, petitioner appealed and respondents cross-appealed from various district court decisions to the Court of Appeals for the Second Circuit. In March 1997, the Court of Appeals issued a decision ("*Lightfoot I*") in which it affirmed all of the district court's decisions except the grant of a remittitur. (Pet. App. at 11a-43a). With respect to the district court's grant of a remittitur, the Court of Appeals held that the district court had erred in granting a remittitur without offering petitioner the option of electing a new trial on damages. Accordingly, the Court of Appeals remanded the case to the district court to allow petitioner the opportunity to exercise that option. (Pet. App. at 41a-43a). The Court of Appeals did *not* hold, however, that there was anything improper in the district court's remitting the verdict to $75,000, nor did it hold that the district court should have allowed the $750,000 verdict to stand (Pet. App. at 41a-43a), even though petitioner argued for such rulings.

In May 1997, the district court held a pre-trial conference with the parties at which it offered petitioner the opportunity to accept the remitted award or to elect a new trial on damages. The district court also offered its services as a mediator for the parties to settle the case. In attempting to facilitate a resolution of the case, the district court advised petitioner that, based upon the evidence presented at the first trial, $75,000 was an appropriate award. Petitioner indicated that he wished to proceed with a second trial on damages.

Subsequently in May 1997, petitioner moved a second time for an order of recusal on the ground of alleged bias. This second motion was based on petitioner's claim that the district court's comments at the May 1997 pre-trial conference evidenced bias. The district court denied the motion, noting in an August 28, 1997[2] decision that the comments at the pre-trial conference "merely reiterated" the district court's view that was embodied in the October 1995 remittitur order and stating that no reasonable person would construe the comments as evidencing bias.[3] (Pet App. at 49a-53a).

The Second Trial on petitioner's claim for compensatory damages under the NYHRL was held in January 1998.[4] The jury returned a verdict that petitioner had sustained mental anguish and/or pain and suffering as a result of his termination by Carbide and awarded him $20,000 as damages. The instant petition for certiorari then ensued.

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[2] Petitioner's appendix incorrectly indicates the date of the decision as August 28, 1998.

[3] Additionally, the district court explicitly noted that evidence presented at the Second Trial might support a larger award. (Pet. App. at 51a-52a).

[4] Petitioner complains in his Statement of the Case that certain evidence that he proffered at the Second Trial was excluded by the district court. (Pet. at 5). Because petitioner neither included this issue in the Questions Presented for Review, nor in his Reasons for Granting the Petition, this issue is not a matter upon which petitioner is properly seeking review. *See* Sup. Ct. R. 14.1(a).

Summary of Argument

The instant petition represents the latest attempt by petitioner in his continuing quest to extract as large a payment from Carbide as possible, despite the facts that he has suffered minimal, if any, damages since his termination and that this matter could have largely been resolved many years ago had petitioner accepted Carbide's bona fide offer of reinstatement.

Throughout this litigation, petitioner has sought to increase his monetary award not only by appealing twice to the Court of Appeals from nearly every adverse ruling issued against him by the district court but by, *inter alia*, moving for attorneys' fees under ADEA despite the pre-trial dismissal of his ADEA claim; twice moving to disqualify the district judge due to alleged bias; and making post-trial, post-appeal motions to amend his complaint.

Indeed, petitioner never gives up. However, the reason that petitioner seeks additional compensatory damages — which reason was revealed at the Second Trial — simply is not a basis under the law for awarding such damages. At the Second Trial, while testifying about petitioner's purported concern about his financial situation, petitioner's expert psychiatric witness let slip that petitioner "has spent over $350,000 on this lawsuit alone" and that one of petitioner's concerns is that "he feels that he is never going to get that money back." Petitioner's desire to recoup his "investment," while understandable, does not provide a valid basis for awarding compensatory damages under the NYHRL.

In this latest attempt, petitioner fails to present any basis warranting review by this Court. Not only are petitioner's arguments concerning purported errors by the Court of Appeals erroneous and insufficient grounds for Supreme Court review, but the petition consists almost exclusively of novel arguments and theories that were never raised below. For these reasons, and because the Court of Appeals correctly

applied the law to affirm the second jury verdict and all of the decisions of the district court, the petition for certiorari must be denied.

Reasons Why the Petition Should Be Denied

I. Petitioner Has Not Presented any Valid Ground for Granting His Petition for Writ of Certiorari.

Rule 10 of the Rules of the Supreme Court makes clear that a petition for a writ of certiorari will be granted only for "compelling reasons." *See* Sup. Ct. R. 10. As this Court has explained, "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991); *see also* Sup. Ct. R. 10. As Rule 10 further states, "a petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Sup. Ct. R. 10. Indeed, this Court has indicated that it is not the role of the Court to undertake to review findings of fact by the lower courts, particularly where the trial court and court of appeals make concurrent findings of fact. *See Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665, 107 S. Ct. 2617, 2623 (1987).

Here, petitioner has not demonstrated any basis for this Court to grant certiorari. Plaintiff has not presented any conflicts in decisions among the courts of appeals or any state court of last resort concerning an important federal question. Instead, petitioner here essentially seeks reconsideration of purely factual findings made by the district court and affirmed by the Court of Appeals in connection with more than one half dozen different issues.

Moreover, in an unpersuasive effort to convince this Court that he in fact is presenting important legal questions for review, petitioner devises new theories regarding the remedies available under ADEA. None of petitioner's new-fangled theories was presented to the courts below, and none of them garners any support from any caselaw.

In short, petitioner has not presented any compelling reason that this Court should grant certiorari, and therefore the petition should be denied.

II. The Court of Appeals and the District Court Correctly Decided the Factual Issues Raised By the Instant Petition.

A. The Lower Courts Properly Dismissed Petitioner's Claims for Back and Front Pay.

The district court properly granted and the Court of Appeals properly affirmed the grant of summary judgment as to petitioner's claims for back and front pay on his age discrimination claims because, as a matter of law, petitioner waived those claims by declining Carbide's unconditional offer of reinstatement. *See Ford Motor Co. v. EEOC*, 458 U.S. 219, 241, 102 S. Ct. 3057, 3070 (1982).

Petitioner first attempts to obtain review by this Court of the grant of summary judgment on his back and front pay claims by arguing that fact issues existed as to whether he unreasonably rejected the reinstatement offer. (Pet. at 8, 10-11). However, where the district court and Court of Appeals concurrently decided that no material issues of fact existed that petitioner unreasonably rejected the reinstatement offer, petitioner's attempt to re-litigate this fact-laden issue in this Court must be rejected. *See Goodman*, 482 U.S. at 665, 107 S. Ct. at 2623.

Petitioner also attempts to obtain review by this Court by arguing that the holding in *Ford Motor Co.* was "expressly limited" to Title VII claims and that the remedial provisions of the ADEA, which derive from the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, preclude the application of *Ford Motor Co.* to ADEA claims. (Pet. at 6-8). Not only does petitioner provide no authority for this inventive argument, but, this argument was not raised by petitioner before either the district court or the Court of Appeals. As such, this argument must be disregarded by the Court. *See, e.g., Auer v. Robbins*, 519 U.S. 452, 464, 117 S. Ct. 905, 912 (1997) (declining to consider argument that was inadequately preserved in prior proceedings); *Holly Farms Corp. v. NLRB*, 517 U.S. 392, 400, 116 S. Ct. 1396, 1402 (1996) (declining to consider argument not advanced before Court of Appeals, stating "we 'generally do not address arguments that were not the basis for the decision below.'"); *EEOC v. Federal Labor Relations Auth.*, 476 U.S. 16, 24, 106 S. Ct. 1678, 1681 (1986) (noting that Court's normal practice is "to refrain from addressing issues not raised in the Court of Appeals").

Nevertheless, petitioner's argument that the remedial scheme of ADEA does not permit the application of the holding of *Ford Motor Co.* can readily be disposed of. In *Ford Motor Co.*, this Court explained that, consistent with Title VII's goal of ending discrimination and providing jobs to victims of age discrimination, Title VII defendants should be encouraged to "make curative, unconditional job offers to Title VII claimants, thereby bringing defendants into 'voluntary compliance' and ending discrimination far more quickly than could litigation proceeding at its often ponderous pace." 458 U.S. at 228, 102 S. Ct. at 3064. Similarly, the ADEA is designed to encourage the employment of older persons, to encourage employers and workers to find ways of meeting problems arising from the impact of age on employment, and, like Title VII, to encourage employers and workers to effect voluntary

compliance through informal methods of conciliation. *See* 29 U.S.C. §§ 621(b), 626(b).

In addition, ADEA remedies are designed to be compensatory, to make the plaintiff whole, and are not designed to be punitive. *Hansard v. Pepsi-Cola Metro. Bottling Co.*, 865 F.2d 1461, 1469 (5th Cir. 1989). In this connection, it is well-settled that an ADEA plaintiff, like a Title VII plaintiff, has a duty to mitigate his back and front pay damages by using reasonable diligence to find and accept suitable employment. *See Denesha v. Farmers Ins. Exch.*, 161 F.3d 491, 502 (8th Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1763 (1999); *Hansard*, 865 F.2d at 1468; *Cassino v. Reichhold Chems., Inc.*, 817 F.2d 1339, 1345 (9th Cir. 1987). In view of the ADEA's goal of encouraging voluntary compliance with its mandates, and the requirement that ADEA plaintiffs mitigate their damages, the Courts of Appeals and district courts have consistently applied *Ford Motor Co.* to hold that ADEA plaintiffs who unreasonably reject offers of reinstatement are precluded from recovering back and front pay. *See, e.g., Stanfield v. Answering Serv., Inc.*, 867 F.2d 1290 (11th Cir. 1989) (holding that ADEA plaintiff who refused offer of reinstatement could not recover front pay); *Giandonato v. Sybron Corp.*, 804 F.2d 120 (10th Cir. 1986) (holding that ADEA plaintiff who refused offer of reinstatement could not recover back pay).

Petitioner's argument that to apply *Ford Motor Co.* to ADEA claims is somehow inconsistent with the remedial scheme of ADEA not only defies logic, but is without any supporting authority. His statement that the "language [of the ADEA] does not permit such action" (Pet. at 8) is simply false. Rather, Congress granted the courts broad authority to fashion appropriate relief for ADEA claims. *See* 29 U.S.C. § 626(b) ("[i]n any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter. . . ."). Accordingly, the grant of summary judgment as to petitioner's back and front pay claims was entirely

proper and consistent with well-settled caselaw among the Courts of Appeals, and petitioner's disingenuous claim that this matter raises an important "issue of first impression" (Pet. at 9) warranting Supreme Court review must be rejected.

In yet another inventive argument, petitioner contends that the lower courts erred in holding that petitioner was not entitled to back pay during the time that he was receiving severance payments from July 1, 1992 through the date that he rejected Carbide's offer of reinstatement, because severance payments do not constitute "wages" under the ADEA.[5] (Pet. at 11-12). This argument, too, was never raised before the Court of Appeals and, therefore, should be disregarded by this Court. *See supra* p. 10. In any event, petitioner provides no support for his contention that payments received as severance should not offset a claim for back pay for violation of ADEA. To the contrary, it is well-settled that any interim earnings received by an ADEA plaintiff subsequent to his termination, including severance pay, will offset a back pay award. *See Kirsch v. Fleet St., Ltd.*, 148 F.3d 149 (2d Cir. 1998) (deducting from back pay award to ADEA plaintiff amount of money he received from defendant as severance); *Rhodes v. Guiberson Oil Tools*, 82 F.3d 615 (5th Cir. 1996) (same); *Downes v. Volkswagen of Am., Inc.*, 41 F.3d 1132 (7th Cir. 1994) (holding that ADEA plaintiff was entitled to back pay from date that severance payments ceased); *Smith v. World Ins. Co.*, 38 F.3d 1456 (8th Cir. 1994) (reducing back pay award by amount of severance

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[5] Petitioner makes this assertion after first presenting another convoluted argument that his refusal of the reinstatement offer did not constitute "post-termination wrongdoing," and therefore should not preclude him from recovering back and front pay, under *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 115 S. Ct. 879 (1995). (Pet. at 10). Petitioner's argument is simply baffling. The issue here has never been that Carbide discovered after-acquired evidence of wrongdoing by petitioner that would have resulted in his termination — as was the issue in *McKennon* — but, rather, whether petitioner unreasonably failed to mitigate his damages.

ADEA plaintiff received); *Blum v. Witco Chem. Corp.*, 829 F.2d 367 (3d Cir. 1987) (ADEA plaintiffs could not receive back pay during time period they were receiving severance pay). Accordingly, petitioner's attempt to characterize the denial of back pay to him during the time that he was receiving his full salary as severance as a "nullification" of the "remedial provisions of the ADEA" (Pet. at 12) is entirely without merit.

In sum, the lower courts properly precluded petitioner from recovering back and front pay, and petitioner has presented no basis for Supreme Court review of this factual matter.

B. The Lower Courts Properly Dismissed Petitioner's ADEA Claim and Correctly Denied Petitioner's Request for Attorneys' Fees Under ADEA.

Petitioner further argues that, in view of the jury's finding that he was a "victim of age discrimination" under the NYHRL (Pet. at 13-14), he was improperly deprived by the lower courts of remedies under ADEA, including attorneys' fees. This argument, too, presents no basis for review.

First, petitioner's ADEA claim was correctly dismissed prior to trial in view of the unavailability of the remedy sought by petitioner for that claim. Specifically, petitioner never sought equitable relief for the alleged ADEA violation, other than back and front pay, which were foreclosed due to his rejection of Carbide's reinstatement offer. As the lower courts correctly recognized, petitioner's post-trial attempt to urge a claim for equitable relief, by reference to boilerplate language in the prayer for relief of his Amended Complaint seeking "such other and further relief as to this Court may seem just and proper," did not alter the fact that petitioner sought only monetary relief. (Pet. App. at 30a-31a). *See Walker v. Anderson Elec. Connectors*, 944 F.2d 841 (11th

Cir. 1991) (denying post-trial motion for injunctive and declaratory relief made by plaintiff who had not previously sought such relief, in an effort to obtain remedy on which to hinge award of attorneys' fees). Nor could petitioner even identify what equitable relief would be appropriate in view of his rejection of Carbide's offer of reinstatement. (Pet. App. at 30a-31a).

It is well-settled that in the absence of an available remedy for a claim, dismissal of the claim is appropriate. A party will not be permitted to maintain a claim for which no available remedy was sought solely to enable that party to recover attorneys' fees. *See Hale v. Marsh*, 808 F.2d 616, 620 (7th Cir. 1986) (where no viable remedy was available to Title VII plaintiff, court dismissed claim because "[a] Title VII suit [cannot] be maintained for the sole purpose of obtaining an attorney's fee for the plaintiff's lawyer"); *McLaughlin v. State of New York, Governor's Office of Employee Relations*, 784 F. Supp. 961 (N.D.N.Y. 1992) (same).

Because petitioner had no remedy under ADEA, his ADEA claim was properly dismissed and, accordingly, his motion for attorneys' fees under ADEA was correctly denied. *See Walker*, 944 F.2d 841 (mere finding that plaintiff's rights had been violated, without a corresponding remedy, did not qualify plaintiff as a "prevailing party" entitled to attorneys' fees under Title VII).

In sum, no authority supports petitioner's view that he was entitled to recover attorneys' fees under ADEA simply because he prevailed on a NYHRL claim and petitioner has presented no compelling reason for the Court's review of this matter.

C. The Lower Courts Properly Granted Summary Judgment as to Petitioner's Pre-Termination Discrimination Claims.

In his continued quest for a viable remedy for an ADEA claim on which to hinge a request for attorneys' fees, petitioner argues that he was entitled to back pay under ADEA for alleged demotions and other discriminatory acts he purportedly experienced in the years prior to his termination. (Pet. at 3, 12-13). Here, again, petitioner essentially seeks reconsideration of fact-laden issues that were consistently decided by the district court that granted summary judgment as to his pre-termination claims and the Court of Appeals that affirmed the grant of summary judgment.

Specifically, both lower courts rejected petitioner's argument that his pre-termination discrimination claims, for which petitioner failed to timely file charges with the Equal Employment Opportunity Commission ("EEOC") pursuant to 29 U.S.C. §§ 626(d) and 633(b), should nevertheless have been permitted to go forward because the pre-termination incidents, together with his termination, constituted a "continuing violation." (Pet. at 13). The lower courts, after each conducting a careful factual analysis of petitioner's pre-termination claims, consistently held that the facts concerning the alleged pre-termination claims, as set forth by petitioner, did not support a finding of a continuing violation. Rather, as the Court of Appeals aptly stated, "completed acts such as a termination through discharge or resignation, a job transfer, or discontinuance of a particular job assignment, are not acts of a 'continuing' nature." (Pet. App. at 24a (quoting *Malarkey v. Texaco, Inc.*, 559 F. Supp. 117, 121 (S.D.N.Y. 1982), *aff'd*, 704 F.2d 674 (2d Cir. 1983)). Therefore, as the lower courts held, petitioner could not transform his untimely pre-temination claims into a continuing violation and summary judgment as to his pre-termination claims was warranted. (Pet. App. at 65a-66a; Res. App. at Al-A4).

Petitioner has presented no compelling reason that the Supreme Court should re-visit the concurrent factual determinations of both lower courts.

Undeterred, however, petitioner disengenuously argues that Supreme Court review is warranted because a "disparity" exists between the Second Circuit Court of Appeals' decision and decisions of other Courts of Appeals in which continuing violations were found. (Pet. at 13). No such "disparity" in the Courts of Appeals' treatment of the continuing violation doctrine exists. Rather, contrary to petitioner's contention, the Second Circuit Court of Appeals applied the continuing violation doctrine in a manner consistent with the treatment accorded that doctrine by other Courts of Appeals. The Courts of Appeals have consistently held that the continuing violation doctrine is not applicable to discrete and dissimilar acts of alleged discrimination. *See, e.g., Stolzenburg v. Ford Motor Co.*, 143 F.3d 402, 405 (8th Cir. 1998) (denials of promotions "were discrete employment actions" that did not constitute a continuing violation); *Doe v. R.R. Donnelley & Sons Co.*, 42 F.3d 439, 446 (7th Cir. 1994) (rejecting claim of continuing violation because plaintiffs had not demonstrated that "defendant's acts were 'related closely enough to constitute a continuing violation' and not 'merely discrete, isolated, and completed acts'" of discrimination) (citations omitted); *Janikowski v. Bendix Corp.*, 823 F.2d 945, 948 (6th Cir. 1987) (employer's "discrete decisions not to employ [plaintiff] in other positions" did not create continuing violation); *see also Provencher v. CVS Pharmacy*, 145 F.3d 5, 15 (lst Cir. 1998) (rejecting claim of continuing violation because the timely allegations were "too separated by character and time to be viewed as a repetition of the untimely acts").

In the cases relied upon by petitioner (Pet. at 13), the Courts of Appeals found continuing violations where, unlike the instant case, the plaintiffs had plead and established hostile work environment claims, which claims are typically found to fall within the continuing violation doctrine. *See,*

e.g., Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998); *West v. Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1995); *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989). Thus, the factually distinguishable cases cited by petitioner do not demonstrate a split in the Courts of Appeals concerning the application of the continuing violation doctrine.

In sum, petitioner's request for review of this matter should be denied because he has not presented any legal question warranting Supreme Court review but, instead, inappropriately seeks reconsideration of the lower courts' factual determinations.

D. The Lower Courts Properly Granted Summary Judgment as to Petitioner's ERISA Claim.

With respect to petitioner's ERISA claim, again, the district court and Court of Appeals concurrently found that there were no genuine issues of material fact that precluded summary judgment. (Pet. App. at 21a-22a, 84a-85a). It is well-settled that an ERISA claim is not established where the loss of pension benefits was a "mere consequence of, but not a motivating factor behind, a termination of employment." *Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1111 (2d Cir. 1988) (citations omitted). Because the lower courts here found that petitioner failed to offer a single fact that showed that Carbide terminated him "with the intent to reduce his pension benefits" (Pet. App. at 21a), summary judgment was appropriately granted. Again, petitioner has not presented any compelling reason that the Supreme Court should review this carefully considered factual determination of the district court and the Court of Appeals.

Nevertheless, petitioner relies on a misconstruction of *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701 (1993) to urge — for the first time in this action — that the evidence of age bias that he presented at trial was sufficient to preclude summary judgment on his ERISA claim. (Pet. at 15). To the contrary, in *Hazen Paper Co.*, 507 U.S. at 609-13, 113 S. Ct. at 1705-07, this Court made clear the distinction between an employer acting on the basis of an employee's age and acting on the basis of another trait that may correlate with age, such as pension status or seniority. For purposes of establishing a violation of ERISA, a finding that an employer discriminated against an employee based on age cannot substitute for evidence that the employer terminated the employee with the specific intent to interfere with his pension benefits. *See id.; Dister*, 859 F.2d at 1111. Because petitioner failed to present any such evidence of any intent to interfere with pension rights, the lower courts properly granted summary judgment on petitioner's ERISA discrimination claim.

E. The Lower Courts Properly Rejected Petitioner's Recusal Motions.

In this action, petitioner moved twice for the district judge's disqualification[6] on the basis of: (1) comments made and *ex parte* discussions held by the district court at a settlement conference prior to the First Trial; (ii) the district court's grant of a remittitur; and (iii) comments made by the district court at a pre-trial and settlement conference prior to the Second Trial. Petitioner has not presented any compelling reason that this Court should review the district court's

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[6] Because petitioner did not appeal the denial of his first recusal motion in his first appeal to the Court of Appeals, he is precluded from seeking review of the denial of that first motion now. *See supra* p. 10. Nonetheless, respondents will address herein both of petitioner's recusal motions together.

discretionary determinations that the facts did not establish any basis for disqualification.

As a matter of law, the occurrences referenced by petitioner neither provide evidence of actual bias nor present an appearance of impartiality. First, as a preliminary matter, and as the district court stated, petitioner's motions were presumptively untimely, in that they were made after trial and after the issuance of post-trial rulings that were adverse to petitioner, and without petitioner demonstrating any good cause for delay. (Res. App. at A5). *See United States v. Bninkworth*, 68 F.3d 633, 639 (2d Cir. 1995).

Moreover, as both lower courts correctly recognized, neither the settlement discussions nor the remittitur order presented a legally sufficient basis for recusal. First, a court's holding of settlement discussions, including *ex parte* discussions upon the consent of the parties, and comments made by a court regarding the merits of a case to facilitate settlement do not demonstrate bias. *See Johnson v. Trueblood*, 629 F.2d 287, 291 (3d Cir. 1980); *Bilello v. Abbott Labs.*, 825 F. Supp. 475, 479 (E.D.N.Y. 1993); *Smith v. Sentry Ins.*, 752 F. Supp. 1058, 1061 (N.D. Ga. 1990). Likewise a judge's opinions and comments, based on facts introduced during the course of proceedings, cannot be the basis for recusal. *See Liteky v. United* States, 510 U.S. 540, 555, 114 S. Ct. 1147, 1157 (1994).

Additionally, it is well-settled that unfavorable judicial rulings are not a basis for recusal. *See Green v. Branson*, 108 F.3d 1296, 1305 (10th Cir. 1997); *United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992); *Harris v. State of Missouri*, 960 F.2d 738, 740 (8th Cir. 1992); *United States v. MMR Corp.*, 954 F.2d 1040, 1045 (5th Cir. 1992). Indeed, claims of bias may not be based on a judge's rulings even if a disproportionate number of rulings favors one side. *McCalden v. California Library Ass'n*, 919 F.2d 538, 547 (9th Cir. 1990); *United States v. Helmsley*, 760 F. Supp. 338, 344 (S.D.N.Y. 1991), *aff'd*, 963 F.2d 1522 (2d Cir. 1992). In

this connection, as the district court aptly noted, petitioner's counsel has a "peculiar habit of filing recusal motions" after the issuance of adverse rulings. (Pet. App. at 52a-53a n.2).

In sum, the district court did not abuse its discretion in denying petitioner's untimely and frivolous recusal motions and petitioner has presented no basis for Supreme Court review of this matter.

F. The Lower Courts Properly Remitted the Jury's Verdict After the First Jury Trial.

Finally, although petitioner does not include in his Reasons for Granting the Petition any arguments as to the propriety of the remittitur of the damage award issued by the jury at the first trial, petitioner peppers his Statement of the Case with assertions that the remittitur was improper. Specifically, petitioner claims that, after *Lightfoot I*, the district court did not comply with the Court of Appeals' directive that on remand the district court "reconsider[]" the grant of a remittitur. (Pet. at 5). Petitioner's argument is sheer nonsense.

In connection with his first appeal to the Court of Appeals, petitioner challenged the district court's remittitur, arguing that:

> the court's reduction of the verdict constituted error as a matter of law, that it violated his right to a jury trial, that the size of the [$750,000] verdict was supported by the evidence, and that the district court erred by not offering him the option of a new trial as an alternative to remittitur.

(Pet. App. at 3a). The Court of Appeals held that the district court should have offered petitioner the option of a new trial on damages, and therefore remanded the case "to allow Lightfoot the opportunity to exercise this option." (Pet App. at 3a-4a). Accordingly, petitioner was offered, elected and participated in a Second Trial on damages.

After the Second Trial, petitioner re-raised in his second appeal to the Court of Appeals (*"Lightfoot II"*), the same arguments about the impropriety of the remittitur that he had raised in *Lightfoot I*, and also claimed that the district court had disregarded the Court of Appeals' directive to "reconsider" the remittitur. In *Lightfoot II* the Court of Appeals stated that all of petitioner's contentions regarding the remittitur had been considered and ruled on in *Lightfoot I*, that petitioner's only meritorious contention had been that petitioner should have been offered the option of a new trial on damages, and that that was the sole purpose of the remand. (Pet. App. at 3a-4a). Thus, petitioner's claim that the district court did not heed the Court of Appeals' directive on remand is without basis.

Finally, as previously stated, aside from requiring the district court to offer petitioner the option of a new trial, the Court of Appeals concurred completely with the district court that the $750,000 verdict was excessive and not supported by the evidence at the First Trial. Thus, given the concurrent factual findings of both lower courts that the remittitur of the damages award after the First Trial to $75,000 was appropriate, there is no compelling reason for this Court to review the grant of the remittitur.

Conclusion

For the reasons set forth above, we respectfully submit that the petition should be denied.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD HALL LIGHTFOOT,

Plaintiff,

v.

92 Civ. 6411 (HB)

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION, and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

June 23, 1995
9:40 a.m.

Before: HON. HAROLD BAER, JR., District Judge

APPEARANCES

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Attorneys for Plaintiff
ARTHUR M. WISEHART
MICHAEL H. PRINCE

MCDERMOTT, WILL & EMERY
Attorneys for Defendants
JOEL E. COHEN
NANCY I. SOLOMON

(In open court, jury not present)

THE COURT: I just want to read a response to what it was that we talked about the last time that we were together and clarify the decision with respect to the plaintiff entitlement to pretermination damages for alleged pay disparity and back pay awards are designed to address economic injury that the plaintiff has suffered as a result of discriminatory conduct, *Rasimas v Michigan Department of Mental Health*, 714 F.2d 614 and 626.

Accordingly, back pay includes any raises which the plaintiff would have received but for discrimination, because Judge Patterson previously ruled in this case that summary judgment was appropriate in the defendants' favor in all causes of action as to Carbide's liability for back pay. In his opinion, July 25, last year, Lightfoot is not entitled to pretermination damages for alleged pay disparity.

During our conference on June 20th, I am just reiterating what we resolved on that occasion, that we all, both parties, agree, that in light of my ruling, Lightfoot may not pursue pretermination damages for alleged pay disparity; and in light of Judge Patterson's prior rulings that Lightfoot may not seek back pay or front pay damages, Lightfoot has no compensable damages under ADEA. The plaintiff has, therefore, agreed that the ADEA cause of action must be dismissed, and both parties further agreed that plaintiff's sole remaining claims for compensatory damages under the New York State Executive Law, and it's that law and the law applicable to it that we will charge the jury at the end of this case.

The only housekeeping matter I would like to take up is that I would like, if we could to go, even though we are starting late, only to three o'clock, primarily because I have a variety of other problems; and therefore, I am going to see if I can convince the jury in exchange for getting out an hour or two earlier, they are ready to have precious few recesses.

My thought is that maybe we have a half an hour from 12 to 12:30, and then we would simply go until 3 o'clock. If that shocks your conscience, anybody, then you ought to let me know and I will not mention it to the jury.

MR. WISEHART: Judge, on the ruling you just made, we don't agree that the ADEA should be dismissed. We take exception to the ruling of Judge Patterson.

THE COURT: I know. I understand that, but I'm only doing what it is that you agreed had to happen in light of that decision.

MR. WISEHART: We take exception to the decision for the purpose of the presentation of this trial. We understand what you say, and we will comply with it.

THE COURT: You realize essentially what he said is the law of the case, and I really have no choice but to follow it?

MR. WISEHART: We understand that's your ruling.

THE COURT: You have a disagreement with that concept?

MR. WISEHART: Well, we have had a number of letters that we have exchanged on the issue.

THE COURT: On the issue of the rule of the case?

MR. WISEHART: Yes.

THE COURT: And you have come out saying that it's a good thing for Baer to do something different than the language in Patterson's —

MR. WISEHART: No. What we said was Judge Patterson admitted that he had never focused on that precise issue regarding pretermination damages.

THE COURT: Right. I am familiar with that concept. I am simply repeating what it is or asking that we all understand that what it is that I have interpreted his decision

to mean binds me, and as a consequence, there is no ADEA cause here, according to your thinking and mine.

MR. WISEHART: Given that that's your interpretation of his decision, which we disagree with, with all due respect.

THE COURT: But in fact, you understand that we are not going into the ADEA simply as a consequence of his ruling and my adoption or interpretation thereof?

MR. WISEHART: Exactly.

THE COURT: Bring in the jury.

(Continued on next page)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

RICHARD HALL LIGHTFOOT,

Plaintiff,

– against –

UNION CARBIDE CORPORATION, A.W. LUTZ, PRESIDENT, INDUSTRIAL CHEMICALS DIVISION and W.E. SHACKELFORD, VICE PRESIDENT, INDUSTRIAL CHEMICALS DIVISION,

Defendants.

92 CIV 6411 (HB)

DECISION AND ORDER

Hon. Harold Baer, Jr.

I have reviewed the plaintiff's motion for recusal in some detail and while the temptation to recuse myself is close to overwhelming, my obligation to follow the law must prevail and since there was not a scintilla of evidence to support recusal, that motion is denied. Parenthetically, it is hard for this Court to fathom the plaintiff's view that this motion is even timely but perhaps I've missed something or the plaintiff is otherwise motivated. Turning to the motion for vacatur, it lacks any factual or legal basis and it too must be denied. This constitutes the decision and order of the Court.

/s/ Harold Baer
Harold Baer, Jr.
U.S.D.J.

December 8, 1995

Age Discrimination in Employment Act

29 U.S.C. § 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that —

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

Employee Retirement Income Security Act

29 U.S.C. § 1140. Interference with protected rights

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 U.S.C.A. § 301 et seq.], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act. It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter or the Welfare and Pension Plans Disclosure Act. The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

Supreme Court, U.S.
FILED
JUL 22 1999
OFFICE OF THE CLERK

No. 98-1918

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

RICHARD HALL LIGHTFOOT,

Petitioner,

—v.—

UNION CARBIDE CORP., A.W. LUTZ, President, Industrial Chemicals Division, W. E. SHACKELFORD, Vice President, Industrial Chemicals Division,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY TO BRIEF IN OPPOSITION

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Preliminary Draft Report Of The Second Circuit Task Force On Gender, Racial, And Ethnic Fairness In The Courts dated June 10, 1997 5

"Courts Behaving Badly -- Task forces say some judges impatient with job bias cases," ABA Journal, November 1997 5

I. RESPONDENTS' RECUSAL CONTENTIONS EVADE THE CRUCIAL ISSUE OF JUDICIAL BIAS

Respondents' opposition brief ("Opp. Br.") contends that "a judge's opinions and comments, based on facts introduced during the course of proceedings, cannot be the basis of recusal." (Opp. Br. p. 19)

This contention misleads. The valuation placed on the case by the district judge was not "based on facts introduced during the course of the proceedings," as respondents contend, but was based upon a settlement figure was given to the judge in ex parte settlement discussions by counsel for the respondents on the eve of trial before an ounce of evidence had ever been heard by the jury. As shown in Mr. Lightfoot's affidavit in the Appendix to the Petition (95a, 96a ¶ 4), the "remittitur" figure of $75,000 subsequently used by the district judge was derived from the earlier ex parte discussion, not from the evidence subsequently produced at the trial which, as determined by the jury, warranted a verdict of $750,000. (Pet. 47a)

Mr. Lightfoot therefore concluded that the judge's remittitur figure "was intended to punish me for exercising my jury trial rights instead of clearing his docket by settling the case." (Pet. 97a-99a)

That the economic effect of his remittitur figure of $75,000 was essentially punitive and confiscatory of Mr. Lightfoot's legitimate age discrimination claim was known to the district judge. Mr. Lightfoot had previously told him that at such figure he would be "a substantial loser," considering what he had to invest in the case in attorney's fees in light of the extended pre-trial proceedings. (Pet. 100a)

A statutory "tort reform" used to control excessive verdicts, the remittitur procedure in the instant case was perverted into an economic penalty. Violation of Seventh Amendment jury trial rights resulted.

Such a confiscatory result is wholly inconsistent with the remedial purposes of the age discrimination laws. Instead of providing a remedy for the unlawful acts of age discrimination that the jury found to have occurred, the remittitur figure established by the judge was knowingly used to punish the victim of the unlawful acts, and to allow their perpetrator to escape from any deterrent economic effect.

Respondents' brief refers to the supposedly surprising evidence that had "slipped out" in the second trial that Mr. Lightfoot had been forced to expend $350,000 in legal expenses in pursuing a remedy for the injuries that he had suffered as a result of age discrimination. (Opp. Br. p. 7)

This evidence was no surprise to respondents' counsel, however. Such expenditures were the result of the heavy dose of litigation by attrition tactics to which Mr. Lightfoot had been subjected by that same counsel. From the pricey billing rates charged by their counsel and his various law firms, respondents certainly were aware that the legal expenditures that Mr. Lightfoot, their target, had necessarily incurred were modest in comparison, but they did not disclose this information.

The real shocker to the administration of justice presented by this litigation is that in light of the jury's finding that Mr. Lightfoot had been injured to the extent of $750,000, as a result of age discrimination, the district judge nevertheless imposed a remittitur figure of $75,000 that he knew would produce a serious economic loss for Mr. Lightfoot.

The central purpose of the ADEA is to provide a true remedy for victims of age discrimination by providing such "legal or equitable relief as will effectuate the purpose of this chapter...." 29 U.S.C. § 626(c)(1) (Pet. 109a)

Such a drastic interference with the jury's verdict to

produce a punitive economic effect results in a situation in which the judge's impartiality not only "could reasonably be questioned" (the standard requiring disqualification pursuant to 28 U.S.C. § 455(a) (Pet. 112a)), but also one in which the mandatory "bias or prejudice" provisions of 28 U.S.C. § 144 should have been triggered:

> "Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding." (Emphasis added.)

Contrary to respondents' contention that the Second Circuit did not hold "that there was anything improper in the district court's remitting the verdict to $75,000" (Opp. Br. p. 5), the Second Circuit specifically held that the district court judge had violated Mr. Lightfoot's Seventh Amendment jury trial rights because the judge's remittitur order had even failed to satisfy the well-settled requirement of providing for the option of a new trial on damages. (Pet. 42a)

The district judge's attitude, expressed in a conference in the presence of Mr. Lightfoot, that "I don't want any more of your silliness as I found in your brief to the Second Circuit Court of Appeals" (Lightfoot Aff. ¶ 20; Jt. App. A 3203f, A 3298-9), is further evidence of "personal bias or prejudice." So curiously a hostile and unrepentant a statement, on the part of a district judge whose remittitur order had just been reversed as violative of Mr. Lightfoot's constitutional rights, is incompatible with the purpose of 28 U.S.C. § 144.

Review by this Court in the exercise of its supervisory responsibilities is requested to ensure that the safeguards provided

in 28 U.S.C. §§ 144 and 455 are effectively implemented in the instant case and also by the appellate courts in the various Circuits.

This is especially important because the remittitur procedure is confined to use in connection with verdicts considered to be too favorable to plaintiffs, yet for verdicts considered to be too favorable to defendants a similar counter-balance is not provided.

Equal protection problems are raised as a result, in addition to concerns that the remittitur procedure has been used as an outgrowth of judicial hostility to anti-discrimination litigation.

The existence of such pockets of judicial hostility is indicated by recent statistical data that have recently become available. Such data indicate an alarming decline in the reversal rate for employment discrimination cases compared with other appeals in the Second Circuit. See, Draft Report Of The Working Committees To The Second Circuit Task Force On Gender, Racial, and Ethnic Fairness in the Courts (June 5, 1997). (127a)

In 1996, the Second Circuit's reversal rate in employment cases was only one-half of what it was in all civil appeals. (127a)

The Second Circuit's reversal rate of 3.2% for employment discrimination cases, moreover, is far less than half the national average reversal rate of 9.8%. (127a)

According to the statistics, as the number of discrimination cases has increased, the judges' apparent distaste for such cases also has increased, resulting in reversal rates in the Second Circuit which have declined from 20.5% in 1991 to 3.7% in 1996. (127a)

The minimal reversal rate does not tell the whole story. As stated in the conclusion of the Preliminary Draft Report Of The Second Circuit Task Force On Gender, Racial, and Ethnic Fairness In The Courts, (June 10, 1997), at p. 91 (117a):

> "The Committees have reported receiving information, largely from lawyers, to the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome."

The problem has attracted national attention. See Garland, "Courts Behaving Badly -- Task forces say some judges impatient with job bias cases," ABA Journal, November 1997, p. 30, which singles out Second Circuit judges for the comment that some apparently believe that employment discrimination cases are "too trivial for their attention."

Cause for concern is also supplied by anecdotal evidence involving employment discrimination cases obtained by the Second Circuit's Task Force as stated in its Report (115a).

When evidence of bias or prejudice in such a case by a particular judge, as is shown in Mr. Lightfoot's affidavits herein, greater scrutiny of the issue of judicial bias than is exhibited in the Second Circuit's unpublishable decision is necessary to implement the highly important safeguards for the exercise of appellate responsibilities intended by 28 U.S.C. §§ 144 and 455.

This is so particularly since the standard in 28 U.S.C. § 144 is a mandatory standard, not one involving judicial discretion, contrary to the conclusion of Lucille Carr, the Clerk who apparently was delegated to write the Second Circuit's unpublishable decision. (Pet. 6a)

II. THE CENTRAL REMEDIAL PURPOSE OF THE ADEA WAS NEGATED BY THE DECISIONS BELOW

The dominant purpose of the Age Discrimination in Employment Act ("ADEA") is to provide a remedy for age discrimination in employment. The net effect of the decisions below, however, was to negate such purpose. What was provided was not a "remedy" but its antithesis because Mr. Lightfoot's ADEA claim was dismissed not after trial, but before the trial took place, upon an improper determination of a motion for summary judgment.

Respondents' contention that the dispute below is factual in nature is the Achilles heel of their brief in opposition. (Opp. Br. p. 8) That the existence of disputed issues of fact makes a reversible error of the granting of a motion for summary judgment has long been settled by the decisions of this Court that require all facts and inferences to be viewed favorably to the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986); Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548 (1986).

Here, the labeling of what was called "severance pay," accrued and earned over many years of prior service was the same thing as "wages lost" specified in the enforcement provisions of the Fair Labor Standards Act, 29 U.S.C. § 216 (Pet. 112a), involves just such a disputed fact issue. The inference that should have been drawn on the motion for summary judgment is that it was not the same.

Had such a disputed fact issue been properly viewed as precluding summary judgment, Mr. Lightfoot would have been entitled to claim double damages for willful violation of the Fair Labor Standards Act enforcement provision incorporated by the ADEA, 29 U.S.C. §§ 626, 216 (Pet. 112a), as well as recovery

of attorney's fees, 29 U.S.C. § 216, and a true remedy would have been provided accordingly.

The ADEA also provides that the court has jurisdiction to grant "such legal or equitable relief as may be appropriate...." 29 U.S.C. § 626(b) (Pet. 108a). Whether it was "appropriate" on summary judgment to eliminate the claim of Mr. Lightfoot for damages for lost front pay on the basis of the purported reinstatement letter, concocted by Union Carbide while the litigation was pending (Pet. 105a), warrants review because of it inconsistency with the standards previously established by this Court. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14 (1986). That the matter should have been treated as a disputed fact issue precluding summary judgment is indicated particularly in light of the testimony on the subject elicited from Dr. Stanley L. Portnow, M.D., by respondents' counsel in the second trial (A4032-A4033):

> "A. [Mr. Lightfoot] was so sick, he was so depressed, he was under such anguish that for him to go back to the lion's den, so to speak, would have been like impossible for anyone to do.
>
> "He discussed it with me, actually, at some point, I don't remember at which point, and my advice to him was that he had to do, he had to do what he thought was right for him to do and certainly not to do anything that would make him sicker, and I think he turned down the job on that basis.
>
> "Q. So the anguish from being let go by Union Carbide put him in a position where he wasn't in a position to accept an offer of reemployment from Union Carbide?
>
> "A. That's because he was too sick."

III. THE FAILURE TO APPLY OF THE CONTINUING VIOLATION DOCTRINE WARRANTS REVIEW

Respondents contend that the continuing violation doctrine does not bring the age discrimination claim out from under the applicable time bar so as to make back pay damages available under the ADEA. (Opp. Br. pp. 15-17)

The flaw in respondents' contention, however, is that the discussion in their own brief also makes it clear that the applicability of the continuing violation doctrine turns on disputed fact issues. Summary judgment as to those issues under the ADEA therefore was incorrect as a matter of law. (Opp. Br. p. 15)

This Court's review of the issue is of particular importance since this is a case in which the jury later found that age discrimination actually had occurred. Since the existence of age discrimination was found to exist (Pet. 47a), the further issue of just when the chain of similar discriminatory acts had in fact commenced for the purpose of the time bar also should have been submitted to the jury.

All three of the cases cited in respondents' brief at page 17 hold that it was reversible error for the district court to exclude evidence of prior discriminatory acts on the basis that they were time-barred, and therefore support petitioner.

Particularly noteworthy in that regard is Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998), which reversed summary judgment on those grounds, as did Waltman v. International Paper Co., 875 F.2d 468 (5th Cir. 1989), because of the disputed fact issues to which such a motion gave rise.

Since the decision of the courts below is inconsistent with contrary decisions from the Third, Fifth and Ninth Circuits cited

by respondents (Opp. Br. p. 17), review by this Court is of great importance because the disregard of such disputed fact issues by the courts below resulted in the elimination of any remedy whatsoever under the ADEA.

IV. DISMISSAL OF THE ERISA CLAIM IS CONTRARY TO HAZEN PAPER CASE

Respondents' brief is silent concerning the inconsistency of the ruling with this Court's decision in Hazen Paper Co. v. Biggins, 507 U.S. 604, 113 S.Ct. 1701 (1993), relied upon by petitioner in support of his claim under Section 510 of ERISA. (29 U.S.C. § 1140)

Respondents' brief not only ignores the significance of Hazen Paper Co., supra, but exacerbates such disregard by erroneously citing another Second Circuit case, Dister v. Continental Group, Inc., 859 F.2d 1108, 1115 (2d Cir. 1988), in which the reason for Dister's termination was specifically found to be "legitimate and nondiscriminatory," Dister, 859 F.2d at 1115, contrary to the situation presented by the instant case. Dister therefore does not present circumstances that are even remotely analogous to the instant case in which a jury actually found age discrimination to exist in connection with Mr. Lightfoot's termination. (Pet. 46a-48a)

The relevant connection here between the attempt to use downsizing as a pretext used to conceal a discrimination-motivated termination and a concurrent corresponding motivation to use the same pretext to conceal the reduction (and ergo, cost) of pension benefits is important since Hazen Paper Co., supra, holds that the same standards apply in both ERISA and ADEA cases.

As the jury found in the instant case, the downsizing program was a pretext for unlawful discriminatory conduct. The mendacity on the part of Union Carbide, as established by the jury's verdict, therefore made incorrect as a matter of law the use of summary judgment to dismiss Mr. Lightfoot's ERISA discrimination claim as well as his ADEA claim. See St. Mary's Honor Center v. Hicks, 509 U.S. 502, 511, 113 S.Ct 2742, 2749 (1993).[1]

Such a situation was of sufficient concern to cause certiorari to be granted in Hazen Paper Co. v. Biggins, supra, 507 U.S. at 608. The present case therefore presents an a fortiorari situation for the granting of the writ.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Dated: July 21, 1999

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[1] "The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination." (Emphasis added.)

PRELIMINARY DRAFT REPORT OF THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

June 10, 1997

Hon. Sharon E. Grubin
Co-Chair

Hon. John M. Walker, Jr.
Co-Chair

Hon. John T. Curtin
Hon. Sterling Johnson, Jr.
Hon. Constance Baker Motley
Hon. Sonia Sotomayor
Ellen Mercer Fallon, Esq.
Fern Schair, Esq.
Sue Ann Shay, S.D.N., Esq.

Members

C. Employment Discrimination Litigants

As we have stated, a study of case outcomes is not included in this report. However, we note here that some aspects of the Committee Report concerning treatment of litigants in employment discrimination cases are not dependent on case outcomes.

During the course of the Committees' study, some preliminary indicators of less than fair treatment of litigants in employment discrimination cases surfaced. First, the Committees received many comments from lawyers indicating their view that employment discrimination cases are disfavored by judges. Disfavor of sexual harassment litigation, in

[89]

particular, accounted for many of the specific complaints and comments that were received.[81] At hearings and in focus groups various disturbing stories were related. In rare instances, openly discriminatory statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another, a judge was alleged to have inappropriately conveyed through his facial expressions and words utter skepticism about the validity of the

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[81] Not every sexual harassment claim is made in the employment context, however. Some, for example, have also come from prisoners accusing guards of harassing them or from students in academic institutions.

plaintiff's claim. Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

Second, some judges surveyed expressed their belief that the proliferation of small cases involving individual claimants, including employment discrimination cases, clog the federal courts and divert the attention of judges away from larger, more significant civil cases.[82] Others expressed concern that rapidly growing caseloads, due in part to increasing employment litigation, will require an increased number of judges, destroying the collegiality

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and cohesiveness of the federal bench.[83]

Finally, in the Committees' view, several appellate opinions hint that some trial judges have exhibited impatience

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[82] It is true that these cases draw heavily on the time of the judiciary. From 1970 to 1989, the number of employment discrimination cases filed in federal courts increased by 2166%, as compared with a 125% increase in the overall civil caseload. Today, employment discrimination matters account for about 10% of the total caseload in the Southern District of New York.

[83] The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies, including litigation involving "economic or personnel relations or personal liability arising in the workforce."

with employment discrimination claims, as well as stereotyped thinking about the seriousness or the reality of sexual harassment claims. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who got promotions and pay raises during the period in which her supervisor demanded sexual favors could nevertheless have suffered legally cognizable emotional injuries. In another instance, a district court's handling of a case suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge made known his impatience with a sexual harassment claim by unexpectedly awarding summary judgment to the defendants on the merits -- a ruling requested by neither side -- despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

These preliminary indications in the Committees' study raise a concern that, when an employment discrimination case is properly before a federal court, a judge's belief that the matter is too trivial for his or her attention may too easily translate into actual unfairness to a litigant as the case proceeds through the system in a form that disproportionately

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disadvantages both women and members of minority groups. Whether this concern will prove to be well founded must await further study elsewhere. However, whatever the reasons underlying the reported dislike by judges of employment discrimination cases, it is important for judges to assure that these cases are not treated with less than the uniform seriousness and respect that litigants deserve. As Judge Edward Weinfeld used to so aptly remark: no case is less important to the litigants involved than another. Furthermore, all judges

should be careful to avoid any remarks or visible reactions that, even if innocently intended, might understandably be perceived by litigants as reflecting biased treatment.

Conclusions:

From the data discussed in Chapter Seven, we reach the following conclusions:

a. While the circuit's interpretation services are generally excellent given the array of languages for which interpretation is sought and the frequency with which interpretation is required, some language requirements, particularly in lesser populated areas, are not being met.

b. The availability and adequacy of interpretation services in civil cases initiated by private parties need study.

c. Assistance to pro se litigants, while adequately serving the needs of these litigants in general, varies in kind and degree among the courts within the circuit, and a better exchange of information between courts is needed.

d. The Committees have reported receiving information, largely from lawyers, to the effect that some judges disfavor employment discrimination cases and therefore might be treating litigants in those cases less than evenhandedly. We view the existence of such a concern as worrisome.

APPENDIX A to the Preliminary Draft
Report of the Second Circuit Task Force
on Gender, Racial, and Ethnic Fairness
in the Courts

DRAFT REPORT OF THE WORKING COMMITTEES TO THE SECOND CIRCUIT TASK FORCE ON GENDER, RACIAL, AND ETHNIC FAIRNESS IN THE COURTS

Gender Committee
John H. Doyle, Co-Chair
Bettina B. Plevan,
Co-Chair

Diane L. Zimmerman,
Reporter

Racial and Ethnic Committee
William J. Snipes, Co-Chair
HectorWillems Rodriquez,
Co-Chair

Beryl Jones,
Reporter

Sheila L. Birnbaum, Executive Director
Carroll Seron, Social Science Advisor

Special Assistants
Sharon Arnoldi
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Amy D. Hundert

Draft: June 5, 1997

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VII: The Litigants

EMPLOYMENT DISCRIMINATION

An area of litigation that generated a large number of spontaneous complaints and concerns was employment discrimination - a category in which minorities and women make up a high percentage of the litigants. Although various specific problems surfaced in focus groups and other settings, the common refrain that summed them up was that judges "don't like" these cases. One attorney reported that a federal judge referred (rather pungently) to her role as legal counsel in discrimination cases as "skunk work." When judges and attorneys, including those otherwise

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enthusiastic in their praise for the generally high standards of fairness observed in federal courts, were queried about the accuracy of the assertion that employment cases are disfavored, many agreed with the proposition. One white male lawyer who does not himself practice employment discrimination law, summed up the problem as follows: "You constantly hear judges say that there are whole categories of cases that don't belong in federal courts....I think if you polled judges, you would find that they think discrimination claims are the most dubious of the cases that actually go to trial. It surely seems that federal judges don't like them, and I wonder how this affects the perception that potential litigants have of the fairness of the courts."

Because of the frequency of such comments, and the fact that the both the Ninth Circuit gender and the District of Columbia Circuit race and gender studies identified employment

discrimination cases as a significantly problematic area, the Committees took a variety of approaches to investigating the question of fairness to litigants in these cases. Two focus groups made up of attorneys representing both plaintiffs and employers were conducted to get the sense of those most familiar with these cases. Questions about the treatment of employment discrimination cases were asked during interviews with a sampling of judges; an attempt also was made to inquire into the attitudes of judges through the judicial questionnaire. Preliminary examinations of empirical data were made to look for any available clues about the possibility that the "dislike" was real and that it might translate somehow into unfairness in the handling of the cases. It is important to stress what is meant by fairness in this context. We do not mean the fairness of rules of substantive law applied by the courts of the Second Circuit. Rather, we mean to ask if, within the confines of applicable law,

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these cases receive evenhanded and unbiased hearings on a level comparable to, for example, a contracts or a securities or an intellectual property case.

We start by noting that, to the extent that judges in fact do dislike employment discrimination cases - a proposition we could not explore directly[256] or comprehensively - a variety

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[256] The Committees initially proposed asking judges to indicate which of a wide range of types of cases they preferred not to handle. Among the categories, employment discrimination was to be listed. Because objections were raised by members of the court on the grounds that the question might be suggestive, the questionnaire was instead changed to ask judges whether certain categories of cases ought not to be handled in federal courts and if so, which ones. About 30%

of explanations can be posited. Some judges attribute the unhappiness with the cases to the fact that plaintiffs in them often appear pro se, and do not understand the law or the court's procedures. Many federal judges also appear to believe that the proliferation of small cases involving individual claimants clog up the federal courts and divert the attention of judges away from larger, purportedly more significant civil cases. Others express concern that rapidly growing caseloads demand larger and larger numbers of judges and destroy the collegiality and cohesiveness of the federal bench. The recently issued Long Range Plan for the Federal Courts, for example, recommended that much of the litigation by individuals be diverted to state courts or be handled to a greater extent by administrative agencies. This recommendation obviously would affect more than employment litigation. However, it is also true that prominent among the recommendations in the report was a specific one that cases involving "economic or personnel relations or personal liability arising in the workforce" be among those largely eliminated from federal litigation.[257]

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Some insight into other reasons for the apparent negativity of some judges toward employment discrimination cases can be gained from an article that appeared three years ago in a New

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responded that there were such cases but only 13 judges actually identified what they were, a number too small to yield meaningful information.

[257] Another target of the report was diversity cases, again often involving individual claimants in tort suits. Interestingly, these are another category of federal cases in which minorities and women are also believed to be more heavily clustered.

York newspaper. The author, a former federal judge, complained that discrimination cases are an unjustifiable consumer of judicial time because they are:

> rarely settled, are characterized by high levels of acrimony and subjective claims of victimization; they are immensely time consuming and are controlled by legal standards that, lacking sufficient precision, are overgeneralized and of marginal use.

Other judges privately agreed that this article captured the views of colleagues who thought the cases too resistant to settlement and too "small potatoes." Others, however, characterized the problem a bit differently, pointing out that, in their experience, the strongest cases do settle, leaving the least meritorious claims for trial.

Certainly, the claim that these cases draw heavily on the time of the judiciary is not exaggerated. From 1970 to 1989, the numbers of such cases filed in federal courts increased by 2,166%, as compared with a 125% increase in the overall civil case load.[258] This increase has been explained by a number of factors, including the broadening of protected classes, the dips in the health of the overall economy, the increase of women in the workforce, and the increased expectations on that part of younger workers that they will be treated fairly.[259] Today, as noted earlier in this Report, about 10% of the total caseload in the Southern District of New York, is made up of

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[258] J. Donohue & P. Siegelman, The Changing Nature of Employment Discrimination Litigation, 43 Stan. L. Rev. 983, 985 (1995) [hereinafter Changing Nature].

[259] Id. at 990-99.

employment cases.[260]

[184]

However, the concerns that emerged were not only related to judicial efficiency. One judge reported that colleagues criticize the employment discrimination area as "highly emotional," and speculated that highly emotional might well be a code phrase for "female." Whether the gender (or the race) of the litigant in itself plays a direct role for some judges in how they think about these cases - remembering, of course, that white men bring a substantial number of age discrimination

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[260] Employers share the concern about the numbers of employment discrimination cases, and have turned in substantial numbers in recent years to requiring new employees to agree that any discrimination claims will be handled by binding arbitration. Because of serious uncertainty about the reviewability of decisions by arbitrators, even in situations where the arbitration result is a deprivation of the benefits of federal law or where the outcome itself seems infected by racial, ethnic or gender stereotyping, these agreements are a matter of considerable concern. At least one such case has come before the Second Circuit; in that case, an arbitrator reinstated an employee who had been fired for sexually harassing a colleague. The district court found public policy to be a justification for reviewing the arbitration decision, and the Second Circuit affirmed. Newsday, Inc. v. Long Island Typographical Union, No. 915. CWA, AFL-CIO, 915 F.2d 840 (2d Cir. 1990), cert. denied, 499 U.S. 922 (1991). A full examination of the relationship between mandatory arbitration and the problems discussed in this report was not undertaken. For an excellent discussion of the problems with arbitration of employment discrimination cases, see Cole v. Burns International Security Services, 105 F.3d 1465 (D.C. Cir. 1997).

cases - there is reason to suspect that the changing nature of employment discrimination claims could play a role in shaping negative judicial attitudes.

In the early years of Title VII, when litigation focused on employers who refused to hire women or minorities for certain jobs (or altogether) the issues were considerably more clear-cut and the inequities more apparent. Today, however, factually more complex claims make up the bulk of the litigation: suits over firings and lay-offs, failure to promote or sexual harassment.[261] Some evidence exists that these sorts of claims may be greeted more skeptically by judges than are failure to hire cases. In fact, judges would seem to be more doubtful about them than are lay jurors.

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According to one recently reported statistic, plaintiffs in employment discrimination cases are almost twice as likely to win before a jury as they are in a bench trial.[262]

Although this disparity is subject to many interpretations, at least one plausible explanation is that judges, removed as they are from contact with the day-to-day operation of the business world, are less sympathetic than are jurors to the complexities

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[261] The study by Donohue and Siegelman, for example, showed that, whereas in the late 1960's, hiring cases greatly outnumbered firing cases, by the late 1980's firing cases outnumbered hiring cases by six to one. Changing Nature, supra, note 258, at 1015.

[262] Allen Myerson, As Federal Bias Cases Drop, Workers Take Up The Fight, N.Y. Times, Jan. 12, 1997, at A1, 14.

of current workplace relationships. Another explanation sometimes offered is that the women and minorities who make many of these claims come across to judges as less credible witnesses than do white men testifying in commercial cases.[263] Lynn Hecht Schafran relates a story about how credibility can be mis-evaluated that demonstrates the possible problem. She tells of a male attorney who almost turned down what turned out to be an important employment discrimination case because, at first hearing, he wrongly interpreted the client's intense psychic distress at the outrageous treatment to which she had been subjected as evidence of hysteria or mental illness.[264]

All of these considerations, collectively, suggest that it would be worthwhile to consider whether employment discrimination litigants receive equitable treatment in the courts of the Second Circuit. The Committees hope that it will be possible in the future to undertake more empirical studies to help clarify some of the questions raised in this Report. One useful avenue for research

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[263] Credibility problems for women as compared with white men have been recognized in a number of settings. See, e.g., Reiko Hasuike, Credibility and Gender in the Courtroom, in The Woman Advocate: Excelling in the 90's (1995); Note Gender and the Role of Expert Witnesses in the Federal Courts, 83 Geo. L. J. 635 (1994); Lynn Hecht Schafran, Credibility in the Courts: Why is There a Gender Gap? The Judges' Journal 5 (Winter 1995).

[264] Lynn Hecht Schafran, Is the Law Male?: Let Me Count the Ways, 69 Chi.-Kent L. Rev. 397, 404-05 (1993).

would be to compare the relative generosity of judges in making fee awards in employment cases as compared with fee awards in otherwise comparable nondiscrimination cases. We were not able to do this study within the time available to us; we did, however, look at two other rough measures - overall reversal rates and the disposition of post-verdict motions in jury trials.

Although overall reversal rates in employment cases are not deeply informative - statistics alone do not indicate, for example, who was favored by the reversal or the circumstances that prompted it - the numbers could give some indication of whether trial court determinations in these cases are any more or less likely to be error-prone than determinations in civil cases generally. As it turns out, the picture we found is complex and puzzling.

Overall, the Second Circuit is less likely than the average Court of Appeals to reverse any civil case appealed to it, including an employment discrimination case.[265] But the relationship in the circuit between rates of civil reversal generally and rates of reversal in employment cases specifically has shifted quite dramatically over recent years. In the early

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[265] Looking at the period from 1990 through 1996, the percent of decisions in all civil cases reversed on appeal in the federal courts nationwide was 12%; in the Second Circuit, the comparable figure was 9.8%. Nationally, federal appellate courts reversed 11.2% of employment cases on the merits, whereas the rate for the seven years at issue in the Second Circuit was just under 10%. Source: Administrative Office of the U.S. Courts.

1990s, the court was markedly more likely to reverse in employment cases than in civil cases generally, whereas, over the last three years, the circuit has reversed a much smaller percentage of employment cases when compared to civil cases generally.

[187]

TABLE 25: Reversal Rates in All Civil and in Employment Appeals

Court and Type of Case	1996	1995	1994	1993	1992	1991	1990
2d Circuit - All Civil Appeals	7.4%	8.9%	10.9%	10.7%	11.4%	8.9%	11.3%
2d Circuit - Employment	3.7%	2.9%	7.3%	13.9%	14.5%	20.5%	13.3%
National - All Civil Appeals	10.6%	10.8%	12.1%	11.3%	12.9%	13.4%	13.7%
National - Employment	9.8%	10.5%	10.1%	11.1%	11.3%	13.3%	13.2%

As the above Table 25 demonstrates, the shifting pattern of reversals in the Second Circuit varies markedly from the national pattern in which the relationship between the two categories remained fairly constant. Further study is needed to understand why the shift that can be seen in the Second Circuit has taken place. One hypothesis would be that trial court judges in the circuit have simply become better in recent years than district court judges nationwide at handling these cases.

The second indicator examined was the disposition of post-verdict motions. Because employment discrimination cases can now be tried to a jury, and because statistical evidence suggests that juries are more favorable to plaintiffs in these cases than are judges, we looked at a sampling of cases to see whether defense motions for a judgment notwithstanding the verdict (j.n.o.v.), for remittitur, or for a new trial fared better in employment than in other types of cases. The Committees' attention was drawn to this subject in part because success on such motions is not routine, and yet we were aware that defendants had prevailed in a number of such motions in recent

years.[266] A computerized search was done, therefore, to identify all reported cases in which a motion for a j.n.o.v., a new trial or remittitur was made during a period of about two-and-a-half years, and the outcomes in employment and non-employment cases were compared. Although there were some disparities in rates of grants and denials, the numbers of employment cases in each category during

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the time period of the study were so small that no conclusions could be drawn.[267] Overall, neither of these preliminary examinations provide clear evidence one way or the other about whether, as a general rule, judges are more harsh or more error-prone in their management of employment cases than they are in other forms of civil litigation. These are areas for potentially useful additional research.

The final area subjected to preliminary examination was that of sexual harassment litigation. The reason for singling out these cases was that they were the ones that, upon analysis, accounted for the bulk of the specific complaints and comments of attorneys (and in some instances, litigants) about employment discrimination cases.[268] At hearings and in focus groups, a

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[266] From 1992 to 1995, we found six such cases that were appealed, five of which were reversed.

[267] It would be worthwhile, however, to redo the study using a longer time frame.

[268] Not every sexual harassment claim is made in the employment context, however. Cases in the Second Circuit have also come from prisoners accusing guards of harassing them or from academic institutions.

variety of disturbing stories were related. In rare instances, blatantly sexist statements by the trial judge were reported. One judge was alleged to have said in open court that a plaintiff's sexual harassment claim was not serious because her employer only stared at her breasts, rather than touching them, and "most women like that." In another case, a judge was alleged to have conveyed through his facial expressions and words his thoroughgoing skepticism about the validity of the plaintiff's claim.[269] Although that plaintiff ultimately won a large judgment, the plaintiff's attorney recalls that the judge "made his views quite clear. It was clear to our client that that was the judge's attitude, and she was furious,

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absolutely furious. She didn't think he had any objectivity whatever."[270] Another lawyer, a defense counsel in

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[269] Staff, too, can convey an attitude of ridicule or disbelief. One focus group participant complained of an instance where a court reporter visibly and repeatedly rolled his eyes while witnesses testified about the emotional distress suffered by a victim of sexual harassment.

[270] Much has been written on the credibility problems experienced by victims of sexual harassment and abuse. See, e.g., Lynn Hecht Schafran, Credibility in the Courts: Why Is There a Gender Gap?, Judges' J. 5 (Winter 1995). A recent California case illustrates the problem. An appellate court set aside the verdict of a trial judge in a sexual harassment case on the ground that the proceedings below were tainted by the judge's dislike of such cases and his unwillingness to treat as credible quite compelling testimony by a plaintiff about her experience. The Court found that the trial judge was animated

employment cases, commented, apparently without irony, that in his experience, judges actually like sexual harassment cases because they find them "entertaining."

A further reason to look at this subset of cases was the fact that the Ninth Circuit gender report had also found sexual harassment litigation to be an especially problematic area. In that report twenty-six cases that generated appellate decisions were found over one five-year period; of these, twenty-three had been won below by the defendant.[271] The Ninth Circuit reversed more than 50% of the defendants' wins in whole or in part. The report also found that about half of all reported sexual harassment cases at the district court level were disposed of either by a motion to dismiss or by granting the defendant's motion for summary judgment.[272]

To compare the situation in the Second Circuit, a

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by gender bias both because he "conveyed the sense [that] he considered sexual harassment cases 'detrimental to everyone concerned' and a misuse of the judicial system" and because his reasons for finding the plaintiff not believable "rests on stereotyped thinking about women and misconceptions of the social and economic realities many women confront." Catchpole v. Brannon, 36 Cal. App. 4th 237, 249, 42 Cal. Rptr. 2d 440, 446, rev. denied, 1995 Cal. LEXIS 5807 (Sept. 14, 1995).

[271] Ninth Circuit Gender Bias Task Force, The Effects of Gender in the Federal Courts: The Final Report of the Ninth Circuit Gender Bias Task Force, 67 S. Cal. L. Rev. 745, 885-86 (1994).

[272] Id. at 886.

computerized search was done on Lexis and Westlaw to identify all decided cases involving claims of sexual harassment that were appealed to the Second Circuit from 1990 through 1996.[273] Twenty-six cases were found. Of these, two were

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omitted from this study because they did not actually address harassment in the claims that led to the appeal.[274] Most of the remaining twenty-four cases that made up the study sample were brought under Title VII of the Civil Rights Act of 1964; but a few invoked Section 1983 or Title IX; not all were

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[273] The search for sexual harassment cases decided since January, 1, 1990, generated 26 published and unpublished opinions in cases directly involving plaintiffs' claims of sexual harassment; several others involved harassment indirectly - for example, suits for damages filed by those accused of harassment - and were omitted from the analysis. Of the remaining cases, one was not brought directly by the alleged victim, but rather by her employer. In that instance, the employer had already tried to fire the person responsible for the harassment; the dismissed employee, however, invoked arbitration under a collective bargaining agreement and was ordered reinstated. The case was filed by the employer to seek judicial review of the arbitrator's decision. Newsday, Inc. v. Long Island Typographical Union, 915 F.2d 840 (2d Cir. 1990).

[274] Of the 26 sexual harassment opinions found, one appeal was dismissed for lack of jurisdiction and one involved a motion to substitute the United States for an individual military officer as the defendant. These were omitted from the analysis on the grounds that they too tangentially touched on the substantive issues of concern here.

employment cases.[275] The findings indicate that sexual harassment litigation has become an increasingly common part of the docket of the Second Circuit; all but six of the opinions analyzed issued since 1994; ten of the most recent twenty were decided in a single year, 1996.

What, if anything, do the appellate opinions show about the treatment of sexual harassment cases in the district courts? First of all, it was interesting to note that half of these cases had been disposed of below on either a motion to dismiss or on summary judgment, a result similar to that reported in the Ninth Circuit, and one that is somewhat surprising, considering that these are cases generally agreed to involve a high level of factual complexity.[276] Overall, the defendant prevailed in 66.6% of the cases at the trial court level, and in fully 91.6% of those decided on dispositive

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motions. Where the cases went to trial, plaintiffs won in seven and lost in five; but consistent with other reports, plaintiffs did markedly better before a jury than a judge.[277]

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[275] One of the 24 cases was a Section 1983 claim by a prisoner, and another was a Title IX action by a student against a school.

[276] Of the 24 cases, 13 were disposed of below by summary judgment or by a motion to dismiss; 11 others were tried, either before the bench or a jury.

[277] Of the 12 cases in the sample that went to trial, five were entirely bench-tried, and seven were tried to a jury. Only one jury trial was won by a defendant, and that case was reversed on the ground that the jury instructions were

On appeal, twelve (50%) of the twenty-four appealed decisions were reversed in whole or in part. This would seem to be a high error rate, given the fact that the circuit reversed about 9.8% of all the civil cases appealed to it over the same time period from 1990 to 1996. Of the cases disposed of below on motion, a third were subsequently reversed in whole or in part on appeal.[278]

Because, as noted earlier, reversal rates alone do not tell a very complete story, the cases were further analyzed. One approach was to break the cases down to see whether, on the whole, the reversals favored defendants or plaintiffs - that is, to determine who was the more favored party in terms of the outcome of the appeal. In only two cases where reversals were granted in full or in part did the result entirely or largely favor defendants. In the other ten instances, the outcome substantially favored plaintiffs, either by reversing in favor of the defendant only on minor issues while leaving plaintiffs' victories below substantially intact, or by reversing defendants'

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inadequate. Of the five tried in their entirety to a judge, four were won by defendants; one case among the 12 was tried in part by a jury and in part by a judge and the plaintiff won both halves. The other "success" of a plaintiff in a proceeding before the judge was on damages, following a previous partial reversal of an earlier decision against her, and a remand. The judge then determined that her damage award for retaliatory discharge should be less than $5000; plaintiff appealed again, unsuccessfully. Of the jury trials won by plaintiffs, four were entirely or substantially affirmed by the Court of Appeals, and two reversed in whole or part.

[278] Seven of the 11 pro-defendant rulings were affirmed, and the rest reversed in whole or in part.

wins below outright or in major part.

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TABLE 26: Analysis of Reversals in Sexual Harassment Cases

Reversal in favor of defendant on all or most issues	2
Reversal in favor of defendant on some issues; plaintiff prevails on main issues	3
Reversal in favor of plaintiff on all or most issues	7
Reversal in favor of plaintiff on some issues - defendant prevails on main issues	0

The findings from two dozen cases obviously do not provide enough data from which to draw any firm conclusions one way or another about whether sexual harassment claims receive short shrift at the trial level. But these preliminary results do suggest reasons for concern, and provide cause for further study. In addition, even this small sample of cases offers some useful insights.

To begin with, a reading of the cases demonstrates at least one obvious reason that both plaintiffs and their counsel are likely to find these cases frustrating: in truth, under existing substantive federal law, even fairly egregious instances of sexual harassment are often simply beyond remedy.[279]

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[279] For example, at least two cases involved claims against union officials and were unsuccessful because the courts found that the Local's office rather than the union was the employer for purposes of Title VII and that the office did not meet the statutory 15 employee minimum. Kern v. City of Rochester, 93 F.3d 38 (2d Cir. 1996), cert. denied, 117 S. Ct. 1335; Yerdon v. Henry, 91 F.3d 370 (2d Cir. 1996). Difficulties in imputing knowledge to an employer is also a possible barrier to recovery in cases where the harassment is otherwise well-established. Kotcher v. Rosa & Sullivan Appliance Ctr., Inc., 957 F.2d 59 (2d Cir. 1992).

Although this is a problem that cannot necessarily be cured by the courts, the distress of litigants and their attorneys ought not be worsened by an unsympathetic and dismissive attitude toward the legitimacy of their claim on the courts' time and attention.

Unfortunately, we found evidence in some cases that such attitudes sometimes do taint the proceedings, just as the anecdotal comments from focus groups, hearings and surveys indicated that they might. In a number of instances, a careful reading of the appellate opinions suggests that some trial judges exhibited impatience with these claims, as well as stereotyped thinking about the

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seriousness or the reality of the sexual harassment. In one instance, a district court judge expressed considerable skepticism that a sexually harassed woman who was not fired and who got promotions and pay raises during the period in which her supervisor demanded sexual favors, could nevertheless have suffered legally cognizable emotional injuries. In another case, the lower court's handling of it suggested a belief on the judge's part that the plaintiff's consumption of alcohol at a business dinner, rather than the egregious misconduct of her fellow employees, was the proximate cause of her rape. And in another case, the judge unexpectedly awarded summary judgment to the defendant on the merits - a ruling requested by neither side, and made despite the fact that neither plaintiff nor defendant had yet addressed in detail any issue in the litigation except for jurisdictional questions.

Thus, this brief look at reported decisions in appealed cases raises concerns that these cases are treated by trial judges with less than uniform seriousness and respect. And yet studies in recent years have shown over and over that sexual harassment is a fact of life for a significant part of the population of

working women. As noted by a recent New York State task force, and by the Ninth Circuit gender report, even among a sophisticated and powerful group of women - lawyers - up to two-thirds report that they have been the recipient of unwanted sexual advances from clients, colleagues or superiors in their professional life.[280]

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It is difficult to dismiss out of hand, therefore, the allegations we heard that judges sometimes engage in stereotyped thinking about these cases, or treat them as too "small potatoes" to be worth their energy and time. In response, it should be recalled that no external calculus establishes the extent of the rightful claim on judicial time that any class of case should make. The dollar value of the case or the importance on the national or world stage of the actors in the dispute obviously can influence a judge's evaluation of whether or not a case is "important." But whether a case is

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[280] The Governor's Task Force, Sexual Harassment: Building a Consensus for Change 33-34 (1993). The Governor's report cited a 1989 survey by the National Law Journal for its estimate that the problem was experienced by 60% of women lawyers. A study in Connecticut by the state bar also revealed a significant amount of sexual harassment experienced by lawyers. Committee on gender bias in the Profession, Connecticut Bar Association. Gender Issues in the Legal Profession, 69 Conn. B.J. 207 (1995). The Governor's report estimates that, overall, half of all working women experience harassment in their work lives. Governor's Task Force, supra, at 30. The Ninth Circuit study found that a third of lawyers reported having been sexually harassed. Ninth Circuit Report, supra note 271, at 829-30.

worth the time it takes is also a function of the values and life experiences that a judge brings to the case. One could argue plausibly that cases involving individual rights and protection against discrimination, even if small and affecting only a single individual, are more rather than less deserving of the attention of the federal bench, and more in need of its expertise, than a large commercial case which the parties, because they are major social actors, could probably get resolved fairly in a variety of fora. The point is simply that when a case is properly before a federal court, a judge's belief that it is too trivial for his or her attention can too easily transmute itself into actual unfairness to a litigant - in this instance, a result that disproportionately disadvantages both women and members of minority groups; this is a problem that deserves attention.